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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 380

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

RUTLAND RAILWAY CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Second Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. .....

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association, individually and as representative of the locomotive engineers employed by plaintiff; and A. S. McCARTHY, individually and as General Chairman of said organization; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association individually and as representative of the locomotive firemen and enginemen employed by plaintiff; and RICHARD DAVIES, individually and as General Chairman of said organization; BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, individually and as representative of the brakemen employed by the plaintiff; and F. J. ESPOSITO, individually and as General Chairman of said organization; ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association, individually and as representative of the conductors employed by the plaintiff; E. K. STONE, General Chairman, and R. H. BROWN, individually and as Local Chairman of said organization,

Petitioners,

v.

RUTLAND RAILWAY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Second Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 18, 1962.

OPINIONS BELOW.

The opinion of the District Court for the District of Vermont is copied at Vol. I, page 69a of the certified record accompanying this petition.[1] The District Court's Findings of Fact and Conclusions of Law and Judgment are reported in 188 F. Supp. 721 (1961). The opinion of the Court of Appeals for the Second Circuit is set forth in the Appendix *infra*, page 4 and is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was made and entered on June 18, 1962. No petition for rehearing was filed on behalf of petitioners. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

I. May, for purposes of 28 U. S. C. § 1391, a suit be brought against an unincorporated association, such as a labor union, in a judicial district in which the union does not maintain its headquarters or principal offices, on the theory that an unincorporated association should, like a corporate entity, be regarded as a resident of any judicial district in which it is doing business?

II. Did the submission by the railroad of its notice of November 2, 1959, under Section 6 of the Railway Labor

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[1] The Appendices to the Petitioners' and Respondent's Briefs in the court below (herein Vols. I and II respectively) have been certified as the Record for use with this petition, nine extra copies of which are filed herewith. By the use of two volumes, the original pagination has been retained. The Appendix to Petitioners' Reply Brief has been attached at the end of Vol. II as pp. 96a-99a thereof.

Act, in itself create a major dispute which required the carrier to maintain the status quo and to bargain in good faith on the question of running through existing crew terminals and creating a new crew terminal?

III. In the circumstances stated in Question No. II, did the carrier, regardless of any rights it may have had under existing agreements, violate Section 2, First and Section 6 of the Railway Labor Act when it abolished existing home crew terminals and bulletined trains to run through such terminals while negotiations over the proposed rules in regard to these matters submitted in the Section 6 Notice were still in progress?

IV. May a strike by the carrier's employees against unilateral changes in working conditions at the time a dispute over the carrier's right to make such changes is being processed by the carrier under the Section 6 procedures of the Railway Labor Act be enjoined as being in contravention of Sections 1 and 8 of the Norris-LaGuardia Act?

V. In the circumstances stated in Question No. IV, may the bargaining representatives of the employees obtain an injunction requiring the carrier to maintain the status quo prescribed by the carrier's Section 6 Notice?

VI. Does a carrier's claim allegedly based on a question of managerial prerogative, which is submitted to the National Railroad Adjustment Board after the start of a strike by the carrier's employees and which submission cannot terminate the dispute since it is incomplete, create a labor dispute in regard to which a strike by the employees is prohibited by the Railway Labor Act, or does the Norris-LaGuardia Act deprive the court of jurisdiction to enjoin a strike under these circumstances?

STATUTES INVOLVED.

The statutes involved are the provisions of Section 2, First, Second, and Sixth and Section 6 of the Railway Labor Act (45 U. S. C. 152, First, Second and Sixth and 156); which are printed in the Appendix at page 1, *et seq.*, and Sections 1, 8 and 13 (c) of the Norris-La-Guardia Act (29 U. S. C. 101, 108 and 113 (c)), which are printed in the Appendix at page 3. The provisions of 28 U. S. C. 1391 (b) and (c) are involved in the issue relating to venue and are printed in the Appendix at page 4.

STATEMENT OF THE CASE.

Respondent Rutland Railway Corporation operated its railroad system under collective bargaining agreements with the petitioners, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors and Brakemen, as the duly recognized representatives of its operating employees. The five individual petitioners named herein are either general or local chairmen of one of the above mentioned Brotherhoods.

The Rutland Railway's operations are divided into three subdivisions. One subdivision runs from the New Hampshire border at Bellows Falls, Vermont, to Rutland, Vermont. The main subdivision runs northerly from White Creek Junction, New York, through Rutland, Vermont, and Burlington, Vermont, to the northern tip of Lake Champlain, at Alburg, Vermont. At Alburg the road proceeds westerly across Northern New York, through Malone and Norwood, New York, to Ogdensburg, New York, a distance of 122 miles. Malone is half way between Alburg and Ogdensburg. Norwood, between Malone and Ogdensburg, is 35 miles from the former and 5 miles from

the latter. The instant proceeding concerns the Ogdensburg Subdivision which stretches from Alburg, Vermont, to Ogdensburg, New York (Vol. II, 3a-4a).

On November 2, 1959, respondent carrier served a notice pursuant to Section 6 of the Railway Labor Act in which it proposed, among other things, to change all existing agreements and rules which would prevent it from consolidating and abolishing crew terminals, merging seniority districts and establishing interdivisional and intradivisional runs (Vol. II, 50a). The pertinent parts of the Section 6 Notice are copied at Vol. I, pages 67a-69a.

On November 30, 1959, conferences between the representatives of the Rutland and of the Brotherhoods were commenced in order to consider the proposals contained in the Section 6 Notices. The parties failed to reach agreement on any of the proposals and the conferences were recessed. The carrier then delegated authority to the Carriers' Eastern Conference Committee to further confer on behalf of the Rutland and other similarly situated railroads, and the labor representatives delegated their authority to the National Conference Committee of the four Brotherhoods. National conferences on the Section 6 Notice of the carriers and the counterproposal of the employee representatives were suspended when the Presidential Railroad Commission was established on November 1, 1960. This Commission rendered a report and recommendations on February 28, 1962. No agreement has been reached between the parties on the railroad's proposals to change all rules preventing consolidation of crew terminals, merger of seniority districts and establishment of interdivisional or intradivisional runs.

Prior to the tendering of the aforesaid Section 6 Notice of November 2, 1959, and continuing thereafter until September 17, 1960, the respondent operated four trains

and two switchers on the Ogdensburg Subdivision. Two of the trains were through freights operating daily in opposite directions between Alburg and Norwood. The home or crew terminal of one was Alburg. The home or crew terminal of the other was Norwood. The two remaining trains were turn around local freights which operated daily out of Malone with Malone being the home or crew terminal for both runs. One train went to Ogdensburg and returned each day; the other, to Alburg and return (Vol. II, 4a-6a).

On September 8, 1960, the railroad posted bulletins which abolished the existing work schedules and reduced the number of runs effective September 16, 1960. The four existing daily freight runs on the Ogdensburg subdivision were to be replaced by two, running daily between Alburg and Ogdensburg in opposite directions. The two new trains operated through the home-crew terminal for local freight previously located at Malone and replaced it with new home terminals at Alburg and Ogdensburg (Vol. II, 6a). The new schedule eliminated ten of the thirty jobs of operating employees in the subdivision (Vol. II, 45a).

Prior to the instant dispute management had recognized on many occasions its duty to negotiate on the establishment of new runs and changes in runs (other than time schedule changes) due to the impact the changes would have on terminals, seniority, jobs, rates of pay and constructive allowances to the employees as a class. The respondent had never changed a terminal without negotiations and agreement with the Brotherhoods (Vol. I, 38a, 40a-41a). On August 30, 1960, immediately prior to the preparation and posting of the advertisement bulletins and notice involved herein, the respondent, in negotiations on wages which were the subject of another dispute only indirectly connected to this instant dispute, requested the

change of five "rules" in exchange for the wage increases agreed upon at the National Arbitration of 1960 (Vol. I, 59a-61a; Vol. II, 69a-70a). Proposed change No. 5 requested provision "for operation of trains between assigned terminals so that wage payments will equal the miles run and/or an eight hour day." Petitioners contended at the district court hearing that management explained that change No. 5 meant the right to operate through established terminals. The district court refused to make this finding. The August 30 conference at which this incident transpired ended without any agreement.

The carrier took an adamant position and refused to bargain. It contended that the proposed changes were strictly within its managerial perogative. In support of its position that terminals could be unilaterally changed, the respondent pointed to several provisions in its agreements with the petitioning Brotherhoods which it asserted granted it the right to act unilaterally. One provision was Article 39(a) of the agreement with the Order of Railway Conductors and with the Brotherhood of Railroad Trainmen. The provision states (Vol. II, 22a):

> "(a) All vacant or new runs will be posted on the division on which they occur within five (5) days, to close within five (5) days, and to be assigned to the oldest bidder within ten (10) days, merit, fitness and ability to be considered. In case of men being away when run is advertised, when reporting for duty their claims to the run will be considered if a junior man has been assigned, if such claim, in writing, is made within five (5) days."

The language of Article XXXVII(a) in the carrier's agreement with the Brotherhood of Locomotive Engineers, and that of Article 39(a) in the agreement with the Brotherhood of Locomotive Firemen and Enginemen, is

essentially the same as in the article quoted above. Also Article 39(e) in the agreement with the Conductors and Trainmen states (Vol. II, 21a):

> "(e) When established runs are changed to operate out of different terminals, schedules changed two (2) hours or more, twenty (20) miles or more, or the layover of such runs changed, they will be considered new runs and bulletined as such."

On September 15, 1960 the Brotherhoods notified the railroad that they would engage in a strike if the carrier instituted the proposed changes on the Ogdensburg Subdivision. The telegram sent to the carrier stated that the union would go on strike at 12:01 A. M., September 16, due to the arbitrary conduct of the railroad in changing home terminals and running through former terminals.

The railroad replied by telegram which stated in part as follows:

> "Rutland Railway Corporation effective September 17, 1960, will arrange train assignment to conform to the demands of traffic. The change is not and cannot be shown to have violated any rule or agreement as alleged. No agreement has been violated and the carrier is merely exercising its right to operate in an economical manner. Conferences on this issue have not been held on the property with the (Brotherhoods)." (Vol. I, 72a-73a; Vol. II, 26a.)

The employees did institute strike action on September 16, 1960 (Vol. II, 24a).

On September 26, 1960, the railroad filed a complaint requesting an injunction and damages against the petitioners on the grounds that the strike was illegal as in derogation of the Railway Labor Act and an improper attempt to usurp legitimate managerial prerogatives (Vol. I, 2a). As part of its complaint, respondent alleged that it

would submit the matters in dispute to the National Railroad Adjustment Board on or about September 30, 1960. Subsequently, four days after filing the complaint, the respondent did make an ex parte submission to the Adjustment Board (Vol. II, 20a-21a). In its submission to the Board, the respondent stated its claim as follows:

> "There are no restrictions under the existing agreements which prohibit carrier from establishing runs, abolishing runs, changing runs to operate out of different terminals to conform to the demands of traffic and operating in an economical manner when there is a falling off of business" (Submission, pp. 1-2).

On October 7, 1960, the petitioners moved to dismiss the action on the ground of improper venue (Vol. I, 6a). This motion was denied on October 10, 1960. The petitioners answered and filed a counterclaim in which they requested an injunction preventing the respondent from putting into effect the schedule of changes set forth in its advertisement bulletins of September 8, 1960 (Vol. I, 19a).

After holding hearings on the merits the District Court enjoined the strike. Consideration of damages was reserved to a later date. The court made findings of fact and conclusions of law and entered a judgment order (Vol. I, 69a *et seq.*). The petitioners moved for additional and amended findings (Vol. I, 78a). The court denied the major portion of the petitioners' motion, but the court did change some of its original findings in a manner directly opposed to petitioners' requests (Vol. I, 83a-84a).

Petitioners appealed from the judgment of the District Court to the United States Court of Appeals for the Second Circuit which reversed and remanded for further proceedings to determine whether the railroad made

reasonable efforts to settle the dispute in conference (Appendix, p. 4). The premise enunciated in the majority opinion of the Court of Appeals is that the Norris-LaGuardia Act requires the carrier to make reasonable efforts to settle a minor dispute, which it found this dispute to be, and that therefore, the lower court should not issue an injunction until the carrier, in compliance with this obligation, conferred with the unions. If the carrier had conferred or taken some undefined steps, the strike was enjoinable. Under this view, the petitioners' request for an injunction against the carrier's unilateral changes could not be substantiated. The district court's findings in regard to the counterclaim were, therefore, affirmed.

REASONS FOR GRANTING THE WRIT.

The judgment rendered by the Court below on the question of Federal Law in regard to the venue of an unincorporated association should be reviewed by this Court because the decision is in conflict with the applicable decision of another Court of Appeals affecting the interpretation of 28 U. S. C. § 1391.

The petitioners Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors and Brakemen are unincorporated associations and labor unions within the meaning of the Railway Labor Act and represent the respective crafts of employees of the respondent carrier. The residence and headquarters of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen are at Cleveland, Ohio (Vol. I, 7a, 11a, 14a). The residence and headquarters of the Order of Railway Conductors and Brakemen is at Cedar Rapids, Iowa (Vol. I, 28a). As this

action arises under the Railway Labor Act, the relevant venue provision is 28 U. S. C. § 1391(b):

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

On the basis of the above section, the petitioning Brotherhoods contend that, being unincorporated associations, proper venue in any action against any one of them lies only in the judicial district where its principal headquarters are located.

The decision rendered below, however, declares that an unincorporated labor association may be sued in any judicial district in which it may be regarded as "doing business." This concept adopts the statutory treatment provided for an action against a corporation under 28 U. S. C. § 1391(c).

The decisions are divided on whether for venue purposes an unincorporated association resides only at its principal place of business or whether it may be accorded treatment similar to that used in determining corporate residence. Many courts, including the Court of Appeals for the District of Columbia Circuit, have held that for determining venue an unincorporated association resides only at its principal place of business. *Brotherhood of Locomotive Fireman v. Graham*, 175 F. 2d 802 (D. C. Cir. 1948), rev'd. on other grounds, 338 U. S. 232 (1949); *Cherico v. Brotherhood of Railroad Trainmen*, 167 F. Supp. 635 (S. D. N. Y. 1958); *McNutt v. United Gas Workers*, 108 F. Supp. 871 (W. D. Ark. 1952); *Griffin v. Illinois Cent. RR*, 88 F. Supp. 552 (N. D. Ill. 1949); *Salvant v. Louisville & Nashville RR*, 83 F. Supp. 391 (W. D. Ky. 1949). In other cases it has been held that

an unincorporated association may be sued in any district in which it is doing business. *American Airlines Inc. v. Airline Pilots Association*, 169 F. Supp. 777 (S. D. N. Y. 1958); *Eastern Motor Express, Inc. v. Espenshade*, 138 F. Supp. 426 (E. D. Pa. 1956); *Portsmouth Baseball Corp. v. Frick*, 132 F. Supp. 922 (S. D. N. Y. 1955).

The judgment of the court below, if permitted to stand, clearly obviates the statutory distinction for purposes of venue of residence for corporations from other entities as provided in 28 U. S. C. § 1391 (b) and (c). These petitioners do not conceive that Congress intended that the residence of unincorporated associations be assimilated to that of corporate entities when Congress has separated the two forms of enterprises in the statute and set forth different requirements for each. The question involved has not been, but should therefore be, settled by this Court.

The Court Below Has Rendered a Judgment Deciding an Important Question Under the Railway Labor Act Seriously Affecting Labor Relations in the Railroad Industry Which Should Be Reviewed by This Court.

The majority opinion of the court below declares that where, pursuant to Section 6 of the Railway Labor Act, 45 U. S. C. § 156, a rail carrier serves a notice of termination of certain clauses in a collective bargaining agreement and the insertion in place thereof of a rule that the carrier would have the unconditional right to establish, move, consolidate and abolish crew terminals or the right to operate through any existing crew terminal, any subsequent unilateral changes by the carrier establishing new runs which changed certain crew terminals and operated through other existing terminals creates a minor dispute covering the extent of managerial prerogative in regard

to these matters. The position was taken that the pertinent provisions of the contract subject to the Section 6 Notice were ambiguous but sufficiently indicated to the court that the existing agreement could be considered to have preserved management's right to unilaterally make changes in train runs thereby permitting it to alter home or crew terminals. In view of the aforesaid ambiguity, the court held that an injunction could be issued against a strike in this labor dispute to protect the jurisdiction of the National Railroad Adjustment Board if it is found on remand that the respondent carrier made reasonable efforts to "confer" on this dispute. Efforts at "negotiation" were not found necessary in this situation. The petitioners' counterclaim requesting an injunction against the unilateral changes undertaken by management prior to completion of the so-called "major" dispute provisions of the Railway Labor Act was dismissed.

The dissenting member of the court below, however, advanced the theory that the Section 6 Notice served by the carrier on November 2, 1959, created a major dispute to be resolved by collective bargaining and ultimately, if necessary, the use of economic force upon compliance with the mandatory procedural requirements of the Railway Labor Act. This opinion asserted that the respondent, upon reaching the belief that it could not secure what it desired through the processes of collective bargaining, violated the provisions of the Railway Labor Act by unilaterally making the same changes it sought in its Section 6 Notice. The minority of the court would have enjoined the respondent carrier's action.

The decision herein is significant in that the factual situation is of national importance involving substantially all of the major railroads of the country in that they served Section 6 and contract termination notices corre-

sponding to those submitted by the respondent railway. These notices are still pending. They are involved not only in the current national rules movement, but also in the numerous proposals for consolidations and mergers which are the order of the day.

More importantly, the decision below results in the erosion of Section 6 of the Railway Labor Act. Under this view there can never be a major dispute if the relevant contractual provision in effect at the time of the service of the Section 6 notice is ambiguous, but clearly governing. This test will also compound the difficulties presently confronting the judiciary from the major-minor dispute distinction.

Although the Railway Labor Act contains no reference to major-minor disputes, these labels were created in the oft-quoted opinion of Justice Rutledge in *Elgin, J. & E. Ry. v. Burley*, 325 U. S. 711 (1945). While originally providing simplicity of expression, the major and minor aspects have culminated in confusion and hardship through the attempted categorization and association of each dispute which thereby diagnoses the dispute's future handling. As the result of this confusion, the processing of a dispute stems from the framing of it or the treatment given the dispute by the first party to invoke the procedures of the Railway Labor Act. *Norfolk and Portsmouth Belt Line R. R. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34, 46 (4th Cir. 1957); see Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 Col. L. Rev. 381, 394-396 (1960). Under this view, by merely submitting any dispute to the Adjustment Board, a minor dispute can always be found in accordance with the rationale of *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957). However, this Court in the *Chicago River* case did not

have before it a situation where a Section 6 Notice was outstanding, where the claim submitted to the Adjustment Board was taken after a strike was instituted, and where the submission did not present the entire dispute for adjudication by the Adjustment Board. By finding a minor dispute based upon any ambiguity in a referrable clause in the existing agreement, a system of compulsory arbitration has been imposed upon the employees in the railway industry in every controversy which is appropriately framed by the carrier. This theory receives no sanction from the language of the Railway Labor Act or in its legislative history.

The fallacy of these decisions of the lower federal courts in misapplying the *Chicago River* rationale can be demonstrated by the facts in the instant case. On November 2, 1959, the respondent served notice that it wanted to terminate and abolish all restrictive provisions and practices in regard to establishment of new runs and wanted to insert a new clause granting it the sole authority to change crew terminals. On September 8, 1960, while the Section 6 proposals were still in negotiation, the carrier notified the unions of its intention unilaterally to establish new runs, thereby changing some crew terminals and operating these runs through other established terminals. However, Section 6 of the Railway Labor Act reads in part:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto * * * rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act * * *." (45 U. S. C. 156.)

Thus the carrier's subsequent unilateral changes were in violation of the Act. Nevertheless, by submitting the

controversy involving the unilateral action to the Adjustment Board, the dispute was considered a minor dispute. Under the view adopted by this decision, the employees are forced to accept the drastic changes imposed upon them through an assertion of managerial perogative and without the assistance of collective bargaining. They are forced to accept a forum which commonly has "long-delayed decisions." *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R.*, 363 U. S. 528, 534 (1960). A decision by the Adjustment Board in favor of these petitioners years after the arbitrary action of the respondent in contravention of the Railway Labor Act would be "but an empty victory". *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. R., supra.*

Hilbert v. Pennsylvania R. R., 290 F. 2d 881 (7th Cir. 1961), *cert. den.* 368 U. S. 900 (1961), is the foremost example of the unlimited use of the major-minor distinction and the impracticability of the holding of the court below that Section 6 is inoperative where there is an allegedly ambiguous, but clearly governing, provision in the existing bargaining agreement. In that case, as here, the same Section 6 Notices were involved with the same issue of home-crew terminals. There, however, a specific rule of the collective bargaining agreement stated:

> "5-P-1. Established terminals will not be changed nor new terminals created except by agreement between the interested local chairman and the superintendent." (290 F. 2d 881, 883.)

The plaintiff therein sought an injunction to prevent the carrier from unilaterally changing home-crew terminals. The court held that the dispute involved a conflict over the interpretation or application of the existing contract and was thus a minor dispute. The request for the injunction was refused. The plaintiff was advised that the

Adjustment Board was the proper forum for a decision in that case although the contract clearly required the carrier to meet and treat in regard to terminals. On the basis of the test expressed by the Court of Appeals for the Second Circuit in the instant case, the *Hilbert* case would necessarily have involved a major dispute (Appendix, p. 25). But *Hilbert* is heavily relied on by the court below in reaching its conclusion that the dispute is minor. Your petitioners contend that the above matters disclose an erroneous concept of Section 6 by the courts in both the *Hilbert* case and the case herein.

The crucial and appalling significance of the decision is that it culminates in a philosophy which limits free and full collective bargaining and withdraws from the railway industry the statutory declared federal policy furthering the right to strike.

It is petitioners' understanding that the right to strike has been limited only to the extent that the Norris-LaGuardia Act had been found not to prevent the issuance of an anti-strike injunction. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957). The holding in that case, however, clearly indicated that it was only applicable to minor disputes. The scope of the limitation on strikes was alternatively stated in the following terms: "The Norris-LaGuardia Act has been held to prevent the issuance of an injunction of a railway labor case involving a 'major dispute.' *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co. supra*, 42 at fn. 24.

As previously noted, however, due to the nature of the major-minor distinction, the dispute may always be framed by the carrier as dependent on an ambiguous contractual provision or by submitting the dispute to the Adjustment

Board. Thereupon the courts have classified these disputes as minor. See *Rutland Railway v. Brotherhood of Locomotive Engineers*, ____ F. 2d ____ (Appendix, p. 29). It is respectfully submitted that the resulting unhampered and unilateral changes by carrier managements are not authorized by the decision of this Court in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., supra.* Unwittingly, the decisions following the *Chicago River* case have expanded the concept of management prerogative and have narrowed the area in which collective bargaining is required. The formidability of the basic theory is now fully comprehended where, as in the present case, pertinent Section 6 Notice was effective and pending.

The court below recognized that the basic dispute, whether major or minor, involved the scope of the railroad's managerial prerogative (Appendix, p. 25). Nevertheless, the court below failed to recognize that management refused to bargain on the subject matter on the basis that being within its prerogative the unions had no function or responsibility in this area. The text of management's Section 6 proposal to completely dispense with collective bargaining on these matters further indicates a disposition of this carrier not to bargain in violation of Sections 2, First and 6 of the Railway Labor Act. If recognition as bargaining representative is to be given its statutory meaning, the employer must afford the representative an opportunity to negotiate concerning the determination of responsibility for decisions on the subjects involved in this case, and also any proposed change in the existing terms of employment. In other words, the problem involved was properly one for the Section 6 procedures as originally taken by management. However, not only did the carrier violate the aforesaid principles, but it further made unilateral changes while the unions ere

bargaining with it. This action of the carrier clearly interfered with normal collective bargaining thereby violating Section 6 of the Railway Labor Act. *Cf. May Department Stores Co. v. NLRB*, 326 U. S. 376, 385 (1945).

Therefore, the question arises as to whether or not a railroad such as respondent can issue a Section 6 Notice eliminating all agreements in regard to train runs and establishing and changing home-crew terminals and proposing new agreements with respect to these matters, among many others, and thereafter abolish and place into effect the same identical working conditions in spite of the express language in the Act, that:

> "In every case where such notice of intended change has been given, or conferences have been held with reference thereto, * * * rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 5 of this Act * * *." (45 U. S. C. 156.)

This is an important federal question which has not been resolved by this Court and it is important that the same should be settled for the benefit of both labor and management in the railway industry.

The Judgment Below Has Decided A Federal Question In A Manner In Conflict With Applicable Decisions of This Court.

A decision involving a similar dispute is *Order of Railroad Telegraphers v. Chicago & N. W. R. R.*, 363 U. S. 330 (1960). In that case the carrier sought to close a number of stations and thereby reduce employment of telegrapher employees. The bargaining representative for the telegraphers served a Section 6 Notice on the carrier which required the railroad to bargain in regard to the

elimination of jobs. The carrier refused to meet with the union on the ground that the subject matter was exclusively for the determination of management and furthermore was a minor dispute concerning the application or interpretation of the contract. However, this Court stated the following (p. 341):

> "Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act required to be heard by the Railway Adjustment Board. We have held that a strike over a 'minor dispute' may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. *Brotherhood of R. Trainmen v. Chicago River & I. R. C.*, 353 U. S. 30, 1 L. ed. 2d 622, 77 S. Ct. 635. *But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement,* rather than to mere infractions or interpretations of the provisions of that agreement. * * *" (Our emphasis.)

The majority opinion below conceded that the *Telegraphers* case, *supra*, presented the court with great difficulty in reaching its conclusion, but contended that the decision rendered was not in conflict with this Court's holding in the former case. (Appendix, pp. 30-31.) The lower court also acknowledged its uncertainty as to the basis of the *Telegraphers* case.

The minority opinion rendered below specifically directed itself to this point. It noted that while the majority recognized the bargainability of the subject matter involved in the dispute, it failed to realize that the only manner in which a contract in the railroad industry can be terminated for purposes of collective bargaining, except by mutual agreement, is by issuance of a Section 6 Notice

(Appendix, pp. 51-52.) This action in the case at bar was taken by the carrier itself on November 2, 1959.

If the decision in the *Telegraphers* case, where a major dispute was found to exist, is to have any meaning, then a major dispute was presented by the facts in the instant situation. The only feature which distinguishes the *Telegraphers* case from the *Chicago River* case and the cases which have followed it is the Section 6 Notice. Thus, *In the Matter of Hudson & M. R. R.*, 172 F. Supp. 329 (S. D. N. Y. 1959), *aff'd per curiam sub nom. Stichman v. General Grievance Committee of the Brotherhood of Railroad Trainmen*, 267 F. 2d 941 (2nd Cir. 1959), *cert. den.* 363 U. S. 843 (1960); *Norfolk & P. B. L. R. R. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), *cert. den.* 355 U. S. 914 (1958); *Missouri-Kansas Texas R. R. v. Brotherhood of Locomotive Engineers*, 266 F. 2d 335 (5th Cir. 1959), *rev'd on other grounds*, 363 U. S. 528 (1960); *Baltimore & O. R. R. v. United R. Workers*, 271 F. 2d 87 (2nd Cir. 1959), *vacated and remanded on other grounds* 364 U. S. 278 (1960), cited by the court below in support of its holding, are cases which did not involve a pending Section 6 Notice. The conflict between the decision in this case and that rendered by this Court in the *Telegraphers* case is emphasized when it is realized that in the instant controversy the respondent took the initiative and the advantage by serving the Section 6 Notice of November 2, 1959. This notice thereupon set forth a dispute for which "rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon" as required by Section 5 of the Act. In spite of the fact that the parties were still negotiating with respect to the Section 6 Notice, respondent issued advertising bulletins and notices which altered the rules or working conditions in violation of the status quo provisions of the Railway Labor Act. These circumstances

point up the distinction between the case at bar and the group of cases cited previously which have found a minor dispute in accordance with the *Chicago River* doctrine. A perusal of these cases, in conjunction with the facts herein, establishes that the *Telegraphers* case is most applicable here and that the judgment rendered by the court below is in conflict with this Court's holding in the *Telegraphers* case.

The decision below also conflicts with the findings of this Court in the recent case of *Sinclair Refining Co. v. Atkinson*, 370 U. S. 238, 8 L. ed. 2d 440 (1962). While that case involved the effect of Section 301 of the Labor Management Relations Act (29 U. S. C. 185) on a strike allegedly in violation of a labor contract, the views expressed indicate a review of the decisions of the lower federal courts in regard to the right to strike under the Railway Labor Act is required. This Court's opinion recognized that a mandatory injunction to require arbitration may be based on different and unrelated considerations from those involved in seeking an injunction against a strike in violation of arbitration procedures or against the exercise of economic force employed to circumvent the enforcement of an agreement to arbitrate grievance disputes. Petitioners believe that the basis of the holding indicates that the right to strike has been unnecessarily curtailed in the railway industry.

This Court considered that *Brotherhood of Locomotive Trainmen v. Chicago River & Indiana R. Co., supra*, enjoined a strike "in defiance of an affirmative duty" because the Railway Labor Act compelled unions "to settle disputes as to the interpretation of an existing collective bargaining agreement" by submission to the Adjustment Board. *Sinclair Refining Co. v. Atkinson, supra*, 450. If this analysis of *Chicago River* was correct, petitioners believe that the corollary must also follow. In other words,

these expressions by this Court indicate that a carrier cannot engage in unilateral self-help where an affirmative duty is placed upon it by Section 6 of the Railway Labor Act. Where the carrier violates this duty by changing the status quo during negotiations on the subjects contained in its notice, the unions should be entitled to engage in self-help. (29 U. S. C. 113(c)) In addition, petitioners contend the decision below fails to acknowledge that for purposes of this proceeding there was no existing contract which required the holding in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., supra,* to govern disposition of this case.

Furthermore, assuming for purposes of argument only that the instant dispute can be labeled "minor", the decision of the Court of Appeals for the Second Circuit is in conflict with this Court's decision in *Manion v. Kansas City Terminal Ry.*, 353 U. S. 927 (1957). In that case the railway petitioned the Missouri state court for an injunction forbidding its engineers and firemen to engage in a strike in support of efforts by their collective bargaining representatives to negotiate a settlement of time claims and grievances. *Kansas City Terminal Railway v. Manion,* 297 S. W. 2d 31 (Mo. App. 1956). Neither the railway or the employees submitted grievances to the National Railroad Adjustment Board. The Kansas City Court of Appeals issued the requested injunction on the basis that a strike over time claims was a violation of the Railway Labor Act and that such a dispute was minor. The case ultimately reached this Court on certiorari. In a *per curiam* opinion, the judgment of the Missouri state court was vacated.

At this point, it should be noted that the only important distinction between the factual situations in the *Chicago River* case and the *Manion* case was that the grievances which led to the threatened strike in the

Chicago River case were submitted to the Adjustment Board before the strike began, while the grievances in the *Manion* case were not submitted to the Board. As previously shown in the instant case, the submission to the Board was not made until the strike had been in effect for two weeks and after the instant action had been filed. Furthermore, the submission made by the carrier was incomplete in that any answer to the issue submitted cannot entirely settle the dispute involved. While the carrier asked the Adjustment Board as to whether there were any restrictions under the contract prohibiting it from modifying runs, including the changing of runs to operate out of different terminals, where business had been reduced, the question in the dispute herein is whether management is required under the contract and past practices to negotiate on any abolition or change in home-crew terminals and the creation of new terminals, including changes in established rates of pay, rules and working conditions, regardless of the carrier's economic position. Whether or not there are any restrictions in the contract on the changing of runs does not determine the dispute over the question of whether the carrier has the sole prerogative to abolish, change or establish home-crew terminals and any matters incidental thereto.

This distinction between the *Manion* and *Chicago River* cases points up the petitioners' contention that a belated and incomplete submission to the Adjustment Board may not convert a dispute into a minor dispute. If these decisions hold that the commencement of a strike over a dispute is unlawful while the dispute is pending before the Board, the submission by this carrier did not give the Board jurisdiction over the dispute involved in the strike. The dispute was not and is not pending before the Board. An injunction was therefore not necessary in this case to protect the primary jurisdiction of the Board. The same

result is reached if the basis of these decisions is that the carrier had an adequate administrative remedy which was to be used before requesting injunctive relief in that the carrier has never submitted to the Adjustment Board the dispute involved in this strike.

Therefore, whether the facts establish a dispute which is considered major or minor, the judgments below have decided the question in a manner in conflict with the applicable decisions of this court.

The Judgment Submitted In This Case Is In Conflict With That In A Similar Case Decided By Another Court of Appeals.

In the courts below, the petitioners relied heavily on the case of *Butte, A. & P. Ry. v. Brotherhood of Locomotive Firemen & Enginemen*, 268 F. 2d 54 (9th Cir. 1959), *cert. den.* 361 U. S. 864 (1959), to support their construction of the Railway Labor Act. The Court of Appeals for the Second Circuit declined to follow this view of the law. It contended that the *Butte* case was inapplicable on its facts.

Except for an attempted withdrawal of a pending Section 6 Notice, the situation in the *Butte* case was substantially the same as is presented here. There the railway served a Section 6 Notice proposing an amendment of its existing agreements with the Brotherhood to permit the loading of ore in a certain yard with mainline crews instead of yard crews. This proposal was rejected by the bargaining representative. The carrier then served another Section 6 Notice proposing to reduce the number of employees in the crews working at this yard. The proposal was likewise rejected and was submitted to mediation. While the Section 6 proposals were in mediation, the carrier advised the Brotherhoods that it was going to use crews employed by its parent corporation to do the switch-

ing at the yard. Shortly thereafter the unions notified the carrier that the employees represented by them would go out on strike if other crews were used. Two days later the carrier notified the Adjustment Board of the dispute and requested it to "accept jurisdiction and docket." The adjustment Board advised the railroad that the matter was not properly submitted for jurisdiction to be accepted. The submission was evidently never perfected.

On these facts, the courts held that the dispute which led to the strike threat was a major dispute which was being processed under the Section 6 procedures. It was further found that the status quo provisions activated by the Section 6 notice were circumvented by the carrier's unilateral action in using the three man crews of its parent corporation. Therefore, an anti-strike injunction was found prohibited.

In the *Butte* case the railroad specifically requested a change in existing agreements. At that time there was no question raised by the carrier as to the interpretation of existing agreements. When it could not obtain the proposed concessions through collective bargaining, it unilaterally made indirect arrangements to accomplish the same things requested in its Section 6 Notices.

There is no distinction between that situation and the instant case, for this carrier circumvented the Section 6 procedures by placing into effect the same changes which it sought in its Section 6 Notice of November 2, 1959. The submission to the Adjustment Board could not change the basic nature of this dispute. It is the contention of the petitioners that a major dispute should also have been found on these facts.

In view of the conflict in the cases coming before the various Courts of Appeal in regard to the effect of a Section 6 Notice and the meaning of a major dispute for

purposes of the Railway Labor Act and the Norris-La-Guardia Act, it is believed that this Court should provide definitive standards by the settling of the questions submitted in this case.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 380.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

RUTLAND RAILWAY CORPORATION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Second Circuit.

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APPENDIX.

STATUTES INVOLVED.

Title 45 U. S. C. § 152, First, Second and Sixth, and § 156.

§ 152. General duties—Duty of carriers and employees to settle disputes.

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier in-

volved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties. * * * May 20, 1926, c. 347, Sec. 2, 44 Stat. 577; June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186; June 25, 1948, c. 646, Sec. 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.

§ 156. Procedure in changing rates of pay, rules, and working conditions.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Title 29, U. S. C. §§ 101, 108, and 113(c).

§ 101. Issuance of restraining orders and injunctions; limitation; public policy.

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. Mar. 23, 1932, c. 90, § 1, 47 Stat. 70.

§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief.

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, § 8, 47 Stat. 72.

§ 113. Definitions of terms and words used in chapter.

When used in this chapter, and for the purposes of this chapter—

* * * (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. * * * Mar 23, 1932, c. 90, § 13, 47 Stat. 73.

Title 28 U. S. C. § 1391 (b) and (c)

§ 1391. Venue generally.

*** * * (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenshp may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.**

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes. * * * June 25, 1948, c. 646, 62 Stat. 935.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Before: WATERMAN, KAUFMAN and MARSHALL, *Circuit Judges.*

Defendants-appellants seek review of an injunction order issued by the United States District Court for the District of Vermont, Gibson, *J.*, enjoining, on the ground that the strike was illegal because it arose out of a "minor dispute," any further strike activity by the defendants. Though the court below correctly held that the dispute was a minor dispute, the case is reversed and remanded for findings as to the good faith of management in the conduct of conferences prior to the strike.

WATERMAN, *Circuit Judge*:

The four appellant labor unions, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and the Order of Railroad Conductors and

Brakemen, hereinafter referred to collectively as the defendant brotherhoods, and the five individual appellants, each either a general or local chairman of one of the above-mentioned brotherhoods, appeal from a judgment order of the United States District Court for the District of Vermont, enjoining as of October 27, 1960, the unions, their members, and agents from further striking, picketing, or using any other form of economic coercion in connection with a dispute which the plaintiff Rutland Railway Corporation had submitted to the National Railroad Adjustment Board, the injunction to remain in effect until the Board had disposed of the dispute.

The strike began on September 16, 1960. It continued until the injunction order was effective. Then, obedient thereto, the workers went back to their jobs.

The Rutland Railway operations are divided into three subdivisions. One subdivision runs from the New Hampshire border at Bellows Falls, Vermont, to Rutland, Vermont, and is approximately 52 miles long. The main line subdivision runs northerly from the southwestern corner of the State of Vermont through North Bennington, Rutland, and Burlington, Vermont, to the northern tip of Lake Champlain at Alburg, Vermont, a distance of about 155 miles. At Alburg the road proceeds westerly across northern New York State through Malone and Norwood, New York, to Ogdensburg, New York, a distance of one hundred twenty-two miles. Malone is halfway between Alburg and Ogdensburg. Norwood, between Malone and Ogdensburg, is 35 miles from the former and 25 miles from the latter. The portion of the line from Alburg to Ogdensburg is called the Ogdensburg Subdivision.

On November 2, 1959, the Rutland Railway, which had been in financial difficulty, sent notices to the general chairmen of the four defendant brotherhoods, as the duly

recognized representatives of the Rutland's operating employees, to inform the labor organizations that the carrier proposed, among other things, to change all existing agreements and rules which would prevent it from consolidating and abolishing crew terminals, merging seniority districts, and establishing interdivisional runs.[1]

---

[1] The relevant part of the notices given by the Rutland were as follows:

"We hereby give notice, under our existing agreements and pursuant to the provisions of the Railway Labor Act, that effective January 1, 1960, we propose to revise and supplement such agreement or agreements in accordance with the proposal set forth in 'Attachment A' appended hereto.

ATTACHMENT A

* * * * * *

"ROAD TRAIN AND ENGINE SERVICE ASSIGNMENTS.

"A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of road train or engine service employees, which

"(i) prohibit or impose restrictions on the right of the carrier to establish, move, consolidate or abolish crew terminals, or merge or consolidate seniority districts,

"(ii) prohibit or impose restrictions on the establishment or operation of interdivisional, inter-seniority district, intradivisional or intraseniority district runs.

"(iii) prohibit or provide penalties for running crews through established crew terminals, or

"(iv) provide for automatic release of crews upon arrival at terminals or end of run, or when off of assigned territory.

"B. Establish a rule to provide that

"1. The carrier shall have the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate seniority districts, and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turnaround (including short turnaround) basis and through established crew terminals. * * *

"2. No rule, regulation, interpretation or practice, however established shall be construed to in any way prohibit,

(Continued on following page)

As part of a concerted country-wide effort to initiate national discussion of railroad problems most of the Class I carriers in the nation also delivered similar notices to brotherhood officers.

The issuance of these notices was required by Section 6 of the Railway Labor Act, 44 Stat. 582 (1926), as amended, 45 U. S. C. § 156 (1958).[2] At the time these

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(Continued from preceding page).

restrict or limit the provisions of paragraph 1 of this rule except as provided in sub-paragraphs (a) and (b) of this paragraph 2.

* * * * *

"(b) Before a run is established under the provisions of this rule which the carrier does not now have the right to establish without agreement with its employees, and which involves both the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for such class of service, the carrier shall give notice to the general chairman * * *

"3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

---

[2] The section reads:

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

notices were sent the Rutland Railway had collective bargaining agreements with the brotherhoods.

On November 30, 1959, conferences between representatives of the Rutland and representatives of its employees were commenced in order to consider the proposals contained in the Section 6 notices sent November 2. The parties failed to reach agreement on any of the proposals, and the conferences were soon recessed. The railroad then delegated authority to the Carriers' Eastern Conference Committee to further confer on behalf of the Rutland, and the labor representatives delegated their authority so to do to the National Conference Committee of the four brotherhoods.[3]

The Rutland's financial plight continued to worsen. In the first eight months of 1960 it was hauling 5300 carloads of freight less than it was hauling in the comparable period of 1959. Its operating revenues were $264,000 less than those of the same period in 1959. Therefore the railroad's board of directors met in the spring and summer of 1960 in order to devise methods for combating the company's financial problem. A plan was finally agreed

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[3] The representatives of the employees countered with proposals of their own, served by a Section 6 notice on September 7, 1960. National conferences on these controversies were suspended when the Presidential Railroad Commission was established on November 1, 1960. The President authorized and directed the Commission "to investigate and to inquire into the issues raised by the proposals of the parties involved in the above-mentioned controversy with the objective of making a report to the President, including its findings and recommendations with respect to the controversy, and assisting in achieving an amicable settlement and agreement with respect to issues in dispute between the parties." The Commission rendered its report and recommendations on February 28, 1962. As yet, no agreement between labor and management has been reached on the railroads' proposals to change all rules preventing consolidation of crew terminals, merger of seniority districts and establishment of interdivisional runs.

upon whereby certain operating expenses would be reduced by the abolition of several freight runs.

On its Ogdensburg Subdivision, which stretched from Alburg, Vermont, to Ogdensburg, New York, the Rutland had operated a total of four freight trains and two yard switchers. From east to west on the Ogdensburg Subdivision, there were terminals at Alburg, Vermont; Malone, New York; Norwood, New York; and Ogdensburg, New York. Two of these trains operated daily in opposite directions between Alburg and Norwood. The two other trains operated out of Malone, one going to Ogdensburg and returning each day, the other going to Alburg and returning each day. Pursuant to the decision of its directors to reduce the number of freight runs, the railroad posted bulletins on September 8, 1960, announcing that beginning September 17 the four existing daily freight runs on the Ogdensburg Subdivision were to be replaced by two, running daily between Alburg and Ogdensburg in opposite directions. This new schedule would reduce the number of jobs on the subdivision by ten and would change the home terminals of some of the trainmen whose jobs were not eliminated.

On September 14 the railroad learned that its employees would strike in an attempt to prevent these new schedules from becoming effective. On the morning of September 15 the brotherhoods, obviously referring to the schedule changes on the Ogdensburg Subdivision, telegraphed the railroad that they would go on strike at 12:01 A. M., September 16 because "carrier cancelling 1957 and 1959 agreements by bulletins and changing home terminals and running thru former terminal for certain local freight crews." The railroad replied in part as follows:

> Rutland Railway Corporation effective Sept 17, 1960 will arrange train assignment to conform to the de-

mands of traffic. The change is not and cannot be shown to have violated any rule or agreement as alleged. No agreement has been violated and the carrier is merely exercising its right to operate in an economical manner. Conferences on this issue have not been held on the property with the [brotherhoods].

The operating employees punctually struck at the time indicated by the brotherhoods' telegram that the strike would begin.[4]

---

[4] Meanwhile, another dispute was raging between the Rutland Railway and its employees. This second dispute was only tangentially related to the dispute spelled out in the text. In August 1960 the brotherhoods asked for pay increases for the employees whom they represented. A conference to negotiate this dispute convened on August 30, eight days prior to the September 8 bulletin. The president of the railroad explained to the labor representatives that the financial condition of the carrier made it impossible for management to meet the wage demands of the unions but he stated that if certain rule changes were agreed to by the unions the savings from these changes might permit increases in pay. The changes proposed by the railroad were these:

1. Eliminate all arbitraries.

2. Open closed yards—the only closed yard on this property is Rutland yard, closed to trainmen (yardmen).

3. Dovetail rosters, each craft, Vermont and New York divisions.

4. Make provisions for operating road switchers.

5. Provide for operation of trains between assigned terminals so that wage payments will equal the miles and/or an 8 hour day.

The brotherhoods contended at the district court hearing that a spokesman for the management explained that change No. 5 meant the running of trains through established home terminals, but the district court refused to make such a finding. The August 30 conference ended without success. On September 7, 1960 (see footnote 3), the general chairman of the Brotherhood of Railroad Trainmen served a Section 6 notice on the railroad as-

(Continued on following page)

Ten days later, on September 26, the railroad filed a complaint in the United States District Court for the District of Vermont, asking the court to enjoin a further strike, to order the defendants to comply with the procedural requirements of the Railway Labor Act, and to award damages to the plaintiff.

To support its claim for an injunction the railroad, defining the disagreement with its employees to be whether the management of the railroad had the right to rearrange train runs and thereby reduce jobs and change crew terminals without first negotiating the matter with the representatives of its workers, promptly submitted the dispute to the National Railroad Adjustment Board under the "minor dispute" provisions of the Railway Labor Act, §§ 2 Second, Sixth, 3, 44 Stat. 577, 578 (1926), as amended, 45 U. S. C. §§ 152 Second, Sixth, 153 (1958). On October 7 the defendants moved to dismiss the action because of improper venue. This motion was denied on October 10. The defendants then answered, and filed a counterclaim in which they on their part sought an injunction preventing the railroad from putting into effect the schedule of changes set forth in its bulletins of September 8 until at least the relevant procedures provided by the Railway Labor Act should have been exhausted.

After holding hearings on the merits of the respective claims the district court issued an injunction enjoining the

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(Continued from preceding page)

serting that the brotherhood desired to change existing rates of pay and rules. On September 12, the railroad agreed to submit the union's proposals to national bargaining under the auspices of the National Mediation Board. A National Mediator came to Rutland to mediate this dispute over future wages. There was testimony at the hearing that the Mediator's work did not relate to the dispute over the bulletined changes in train schedules on the Ogdensburg Subdivision.

strike. A consideration of the railway's prayer for an award of damages was postponed to a later date. In its opinion, reported at 188 F. Supp. 721 (D. Vt. 1960), the court held that the dispute out of which the strike arose was a minor one, subject to the jurisdiction and decision of the National Railroad Adjustment Board and that the Section 6 notice of November 2, 1959, sent out by the Class I railroads on the national level did not alter the minor nature of this particular dispute over the rescheduling of freight runs. The court did not grant the defendants' prayer for an injunction to prevent the railroad from effectuating its rescheduling. The defendants appeal to this court, seeking review of the district court decision adverse to them.

The appellants contend that the venue for this action was not properly located in the District of Vermont; that the controversy out of which this litigation arose was not a "minor dispute" as the court below held, but a "major dispute" under the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U. S. C. § 151-63 (1958), and that the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. §§ 101-115 (1958), deprived the court of jurisdiction to enjoin the strike. The appellee railroad asserts, on the other hand, that the court below was correct in determining the dispute a minor one which permitted the carrier to proceed with its schedule changes and required that the employees desist from striking.

VENUE

Three of the defendant brotherhoods, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, have their headquarters at Cleveland, Ohio. The headquarters of the fourth brotherhood, Order

of Railroad Conductors and Brakemen, are at Cedar Rapids, Iowa.

Inasmuch as this action arises under the laws of the United States, namely, the Railway Labor Act, the relevant venue provision of the Judicial Code is 28 U. S. C. § 1391(b):

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The brotherhoods assert that, since they are unincorporated associations, the proper venue for an action against any one of them is only in the judicial district where its principal place of business is situated.

In *Sperry Prods., Inc. v. Association of Am. R.Rs.*, 132 F. 2d 408 (2 Cir. 1942), *cert. denied*, 319 U. S. 744 (1943), involving the venue provision for patent infringement actions, Judge Learned Hand discussed the concept of venue as it related to unincorporated associations. The venue statute there involved, 35 Stat. 1084 (1909), 28 U. S. C. § 109 (1940) (now 28 U. S. C. § 1400(b) (1958)), stated that any suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business." Judge Hand stated that for venue purposes, as well as for other procedural incidents, an unincorporated association should be considered a jural entity, cf. *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922), and that the only practical approach to the procedural problems created by actions involving unincorporated associations was to assimilate their treatment to that accorded corporations. Therefore, Judge Hand concluded that an unincorporated association should

be considered "present" wherever it was continuously carrying on a substantial part of its activities, since this was the standard for the "presence" of corporations. However, he hastened to add that being "present" in a district was not tantamount to being an "inhabitant" of that district. Again assimilating the situation of the unincorporated entity which has no place of incorporation to that of the incorporated entity, Judge Hand announced that the unincorporated entity was an "inhabitant" of the district of its principal place of business.

Although *Sperry Prods., Inc.* involved the venue provision for patent infringement actions, courts have applied Judge Hand's reasoning in that case to the determination of questions that have arisen involving the general venue statute. Until the revision of the Judicial Code in 1948 there was little difficulty in so doing because the general venue statute, 28 U. S. C. § 112 (1940), provided only that "no civil suit shall be brought in any district court against any person * * * in any other district than that whereof he is an inhabitant * * *" Thus Judge Hand's discussion of where an unincorporated association was an inhabitant was applicable with equal force under the general venue provision as it then existed. See *Brotherhood of Locomotive Firemen v. Graham*, 175 F. 2d 802 (D. C. Cir. 1948), *rev'd on other grounds*, 338 U. S. 232 (1949). Cf. *Darby v. Philadelphia Transp. Co.*, 73 F. Supp. 522 (E. D. Pa. 1947). *But see Thermoid Co. v. United Rubber Workers*, 70 F. Supp. 228 (D. N. J. 1947). But in 1948 the general venue statute was redrafted as 28 U. S. C. § 1391; and a subsection (c) was added. This subsection stated:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial dis-

trict shall be regarded as the residence of such corporation for venue purposes."[5]

Under the venue provision drafted in 1948 courts were faced with the question whether they should follow Judge Hand and hold that an unincorporated association resides only at its principal place of business, or whether the process of assimilation which Judge Hand advocated should be extended by assimilating the treatment of unincorporated associations for venue purposes with the newly expanded concept of corporate residence.

The cases are divided on this issue. Some courts have held that for determining venue as unincorporated association resides only at its principal place of business. *Brotherhood of Locomotive Firemen v. Graham supra; McNutt v. United Gas Workers*, 108 F. Supp. 871, 875 (W. D. Ark. 1952); *Griffin v. Illinois Cent. R.R.*, 88 F. Supp. 552, 555 (N. D. Ill. 1949); *Salvant v. Louisville & N. R. R.*, 83 F. Supp. 391, 396 (W. D. Ky. 1949); *Cherico v. Brotherhood of R.R. Trainmen*, 167 F. Supp. 635 (S. D. N. Y. 1958). Cf. *Hadden v. Small*, 145 F. Supp. 387 (N. D. Ohio 1951). Other courts have held that an unincorporated association may be sued in any district in which it is doing business. *Portsmouth Baseball Corp. v. Frick*, 132 F. Supp. 922 (S. D. N. Y. 1955); *American Airlines, Inc. v. Air Line Pilots Ass'n*, 169 F. Supp. 777 (S. D. N. Y. 1958); *Eastern Motor Express, Inc. v. Espenshade*, 138 F. Supp. 426 (E. D. Pa. 1956). And the Supreme Court has not yet spoken on the matter.

Venue in the federal courts is not a jurisdictional concept. See 28 U. S. C. § 1406(b) (1958). H. R. Report

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[5] Another difference between the new statute and the old one was that the new one spoke in terms of "residence" instead of "inhabitance"; but it is clear from the Reviser's Notes to § 1391 that the two terms were intended to be synonymous. H. R. Report 308, 80th Cong., 1st Sess. A147 (1947).

308, 80th Cong., 1st Sess. A154 (1947) (Reviser's Notes). We should not think about it in the metaphysical terms which have often been associated with considerations of jurisdiction. Venue is a concept of convenience. See *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-68 (1939); *Cohen v. Commodity Credit Corp.*, 172 F. Supp. 803 (W. D. Ark. 1959); *Jacobson v. Indianapolis Power & Light Co.*, 163 F. Supp. 218 (N. D. Ind. 1958); *The North River*, 57 F. Supp. 808 (E. D. N. Y. 1944); *Vogel v. Crown Cork & Seal Co.*, 36 F. Supp. 74 (D. Md. 1940). It should be treated in practical terms. See *Sperry Prods., Inc. v. Ass'n of Am. R.Rs.*, *supra*; *American Airlines v. Air Line Pilots Ass'n*, *supra*. Congress has stated in § 1391(c) that the residence of a corporation for venue purposes is not only in the state wherein it is incorporated but also in the places where it is licensed to do business and where it is doing business. It is true that we would be reading into 28 U. S. C. § 1391(c) words which are not there if we should assert that that subsection states that it applies to unincorporated associations. See *Cherico v. Brotherhood of R.R. Trainmen*, *supra*. But we do not find any manifestation here of a congressional policy of *expressio unius est exclusio alterius*, and so we follow the reasoning in *Sperry Prods.* and assimilate the residence of unincorporated associations under 28 U. S. C. § 1391(b) to that of corporations, 28 U. S. C. § 1391(c). Since the residence of a corporation for venue purposes has been expanded to include all the judicial districts in which the corporation is doing business, the residence of an unincorporated association for venue purposes should likewise be expanded to include all the judicial districts in which the unincorporated entity is doing business. We believe this accords with the practical requirements of litigation involving unincorporated associations. If an unincorpo-

rated union is carrying on sufficient activities in a particular judicial district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there. If in certain instances the defense of a suit in a particular district is peculiarly oppressive, the association may always seek a transfer of the action under 28 U. S. C. § 1404(a) (1958).

Turning to the case before us, we hold that the defendant brotherhoods were doing business in the District of Vermont. They set up and maintained grievance committees and other facilities among the employees of the Rutland Railway in Vermont. They organized a strike of railroad employees in Vermont. They negotiated with the management of the plaintiff railroad in Vermont. Therefore, we conclude that venue for this action in the District of Vermont was proper and we affirm the order of the court below denying the motions to dismiss.

Minor or Major Dispute

We think that there are only two general questions presented by the issues of labor law involved in this case. They are: First, is this a so-called "major" or "minor" dispute under the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151-63 (1958)? Second, does the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. § 101-15 (1958) deprive the district court of jurisdiction to enjoin the strike?

For either of these statutes to be operative, there must be first of all a "labor dispute." The Norris-LaGuardia Act, § 13(c), 47 Stat. 73, 29 U. S. C. § 113 (c) (1958), defines a labor dispute as follows:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of per-

> sons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Section 2 of the Railway Labor Act, 44 Stat. 577 (1926), 45 U. S. C. § 151(a) (1958), sets out the disputes to which it applies as "all disputes concerning rates of pay, rules, or working conditions" and "all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." In *Order of R.R. Telegraphers v. Chicago & N. W. R. R.*, 362 U. S. 330 (1960), the Supreme Court explicitly held that a labor dispute existed under the Norris-LaGuardia Act, and implied that one existed under the Railway Labor Act, when a railroad sought to close a number of its stations, and thereby reduce employment. The Court stated:

> Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that "[c]ollective bargaining as to the length or term of employment is commonplace," is not challenged. *Id.* at 336.

Numerous other courts have assumed the presence of labor disputes in similar situations. E.g., *Hilbert v. Pennsylvania R. R.*, 290 F. 2d 881 (7 Cir.), *cert. denied*, 368 U. S.

900 (1961); *In the Matter of Hudson & M. R.R.*, 172 F. Supp. 329 (S. D. N. Y.), *aff'd sub nom. Stichman v. General Grievance Comm. of the Bhd. of R.R. Trainmen*, 267 F. 2d 941 (2 Cir. 1959), *cert. denied*, 361 U. S. 928 (1960). Cf. *Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen*, 268 F. 2d 54 (9 Cir.), *cert. denied*, 361 U. S. 864 (1959). The court below was correct when it found that a labor dispute relating to working conditions existed when the case was heard on October 20, 1960.

In order to avoid interruptions to transportation resulting from disputes over rates of pay, rules, or working conditions, to provide peaceful and orderly procedures for the settlement of these disputes, and to foster the organization of employees, 44 Stat. 577 (1926), 45 U. S. C. § 151(a) (1958), the Railway Labor Act was passed in 1926. 44 Stat. 577, as amended, 45 U. S. C. § 151-63 (1958). The Act contemplates two types of disputes, major and minor, and provides different procedures for handling each. See Railway Labor Act, § 2, 44 Stat. 577 (1926), 45 U. S. C. § 151(a) (1958), *Hearings on H. R. 7650, before House Committee on Interstate Commerce*, 73d Cong., 2d Sess. (1934); *Hearings on S. 3266, before Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. (1934). Mr. Justice Rutledge in his oft-quoted opinion for the Court in *Elgin, J. & E. Ry. v. Burley*, 325 U. S. 711 (1945), explained the distinction between major and minor disputes under the Railway Labor Act:

> The first [major dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

> The second class, [minor disputes] however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future. *Id.* at 723.

See also *Hearings on H. R. 7650, before House Committee on Interstate Commerce,* 73d Cong., 2d Sess. 47 (1934).

In both types of disputes the Act requires that, as a first step, the parties must make every reasonable effort to settle their differences in conference. § 2 First, Second, 44 Stat. 577 (1926), as amended, 45 U. S. C. § 152 First, Second (1958). *Elgin, J. & E. Ry. v. Burley, supra* at 724-25 and nn. 12, 18. Major disputes commence with the issuance of a notice known as a "Section 6 notice," given by the party seeking to change existing agreements. §§ 2 Seventh, 6, 44 Stat. 577, 582 (1926), as amended, 45 U. S. C. §§ 152 Seventh, 156 (1958). In major disputes, if settlement cannot be reached in conference, the matter is referred to mediation under the auspices of the National Mediation Board. § 5, 44 Stat. 580 (1926), as amended, 45 U. S. C. § 155 (1958). If mediation fails, the Mediation Board proposes voluntary arbitration to the parties, §§ 5, 7, 44 Stat. 580, 582 (1926), as amended, 45 U. S. C. §§ 155, 157 (1958), a course of action neither party is required to adopt. *Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50 (1944). Finally, if the President of

the United States desires, he is empowered to set up an emergency board to investigate and report to him with respect to the dispute. § 10, 44 Stat. 586 (1926), as amended, 45 U. S. C. § 160 (1958). The parties are required to comply with each stage in the above-described procedure before either may resort to self-help, and it is the statutory duty of the carrier not to alter rates of pay, rules, or working conditions, *i.e.*, to maintain the status quo, until the Mediation Board has acted upon the dispute. § 6, 44 Stat. 582 (1926), as amended, 45 U. S. C. § 156 (1958); see *Burke v. Morphy*, 109 F. 2d 572 (2 Cir.), *cert. denied*, 310 U. S. 635 (1940). *Grand International Bhd. of Locomotive Engineers v. Morphy*, 109 F. 2d 576 (2 Cir.), *cert. denied*, 310 U. S. 635 (1940). However, the Act does not create any tribunal having final authority to decide a major dispute without the consent of both parties, and in such disputes no provision in the Railway Labor Act prohibits the workers from striking as soon as all of the procedures for settling the dispute have been exhausted without a mutually satisfactory solution having been reached.[6]

The procedure under the 1926 Act for handling the other type of dispute (the minor dispute) soon proved ineffectual to produce peace in the railroad industry. Deadlock often resulted from the refusal by one side or the other to participate in the voluntary local boards which the Act contemplated as the source of decision in such dis-

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[6] Since the Railway Labor Act contains no provision to the contrary, the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. §§ 101-15 (1958), operates to prevent the federal courts from enjoining strikes in major disputes, at least after the exhaustion of all of the procedures provided by the Railway Labor Act for settling such disputes. See *Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R.*, 353 U. S. 30, n. 24 (1957); *Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50 (1944); *Order of R. R. Telegraphers v. Chicago & N. W. R. R.*, 362 U. S. 330 (1960).

putes. Moreover, in many cases in which boards were established no decision could be reached because of the equal number of labor and management members on each board. These circumstances produced an ever-increasing backlog of unresolved disputes. See *Hearings on S. 3266 before Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 17, 137 (1934). To eliminate these roadblocks, the statute was amended in 1934 and the National Railroad Adjustment Board was created, making it unnecessary for the parties to set up local boards. § 3, 48 Stat. 1189 (1934), 45 U. S. C. § 153 (1958); H. R. Rep. No. 1944, 73d Cong., 2d Sess. 3; S. Rep. No. 1065, 73d Cong., 2d Sess. 1, 2 (1934). Under this amendment, if the parties fail to agree in conference, either side may submit the matter to the National Railroad Adjustment Board. Procedures are provided for assuring the Board will not become deadlocked, and unless the Board's decision contains a monetary award the decision of the Board is final and binding on the parties. § 3(i)(1)(m)(n), 48 Stat. 1189 (1934), 45 U. S. C. § 153(i)(1)(m)(n) (1958), see *Union Pac. R. R. v. Price*, 360 U. S. 601 (1959). See generally Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (1937). Thus a system of compulsory arbitration of minor disputes was created by the 1934 amendment. *Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R.*, 353 U. S. 30 (1957); *California v. Taylor*, 353 U. S. 553 (1957). See *Hearings on H. R. 7650 before House Committee on Interstate Commerce*, 73d Cong., 2d Sess. 47, 58, 60, 81-82, 118 (1934); *Hearings on S. 3266 before Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess. 33, 35 (1934). To effectuate these procedures for the conclusive determination of minor disputes, courts have issued injunctions against strikes by the railroad unions. E.g.,

Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R., *supra*; *In the Matter of Hudson & M. R. R.*, 172 F. Supp. 329 (S. D. N. Y.), *aff'd sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen*, 267 F. 2d 941 (2 Cir. 1959), *cert. denied*, 361 U. S. 928 (1960).[7]

The defendants contend that the present controversy is a major dispute under the Railway Labor Act; and, therefore, their strike may not be enjoined; or, at least, may only be enjoined for the short period of time necessary for the exhaustion of mediation and the other major dispute procedures. The railroad, on the other hand, claims that this is a minor dispute, and, therefore, the strike must be enjoined so that the issue between the parties can be decided with finality by the Railroad Adjustment Board. We are called upon to decide whether this dispute is a major or a minor dispute, so that the parties then may go forward under the applicable set of procedures sanctioned by the Railway Labor Act. As *Elgin, J. & E. Ry. v. Burley*, *supra*, explained, the difference between major and minor disputes is that the former relate to new agreements or changes in existing contracts whereas the latter involve the interpretation and the application of existing agreements. We readily recognize that here, as in other areas of jurisprudence, the difference, on the one hand, between the interpretation and the application of an existing agreement, and, on the other hand, a change in an original intended basis of agreement is often a question of degree.

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[7] There is some doubt whether a federal court has power to issue an anti-strike injunction in a minor dispute before the matter is submitted to the Railroad Adjustment Board. Cf. *Manion v. Kansas City Terminal Ry.*, 353 U. S. 927 (1957); *Hilbert v. Pennsylvania R. R.*, 290 F. 2d 881 (7 Cir.), cert. denied, 368 U. S. 900 (1961). But inasmuch as the Rutland Railway has submitted the present controversy to the Board, we are not here faced with this problem.

In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the maneuvers of the parties. Management will assert that its position, whether right or wrong, is only an interpretation or application of the existing contract. Unions, on the other hand, in their assertions about the dispute at issue, will obviously talk in terms of change. Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy appear more like a major dispute. Compare *Order of R. R. Telegraphers v. Chicago & N. W. R. R.*, 362 U. S. 330 (1960). Or they may seek to bring the particular conflict at issue within the bounds of an outstanding Section 6 notice that in reality does not relate to that dispute. See *Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 Colum. L. Rev. 381, 394-97 (1960).

But, on the other hand, we should not in the process of classifying this dispute as major or minor thereby also adjudicate the merits of the controversy between the parties. If this is a minor dispute, a decision on the merits of the dispute is the function of the National Railroad Adjustment Board; and if this is a major dispute the outcome of the parties' difference is to be determined by extrajudicial forces and procedures. See *Order of Ry. Conductors v. Pitney*, 326 U. S. 561 (1946); *Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen*, 248 F. 2d 34 (4 Cir. 1957), *cert. denied*, 355 U. S. 914 (1958).

The disagreement between the Rutland Railway and its employees is not whether the train runs on the Ogdensburg Subdivision should be rescheduled, but, instead, whether the railroad has the unilateral right to make those changes without negotiating about them with the

Brotherhoods. Cf. *Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen, supra; Missouri-K.-T. R. R. v. Brotherhood of Locomotive Engineers*, 266 F. 2d 335 (5 Cir. 1959), *reversed on other grounds*, 363 U. S. 528 (1960). Whether it be a major or a minor dispute, the disagreement is a dispute over the scope of the railroad's managerial prerogative. It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.

The unions assert that the Section 6 notices of November 2, 1959, demonstrate that this is a major dispute. These notices were issued pursuant to national handling and similar notices were issued by most of the other Class I railroads in the country on the same day. *Hilbert v. Pennsylvania R. R.*, 290 F. 2d 881 (7 Cir.), *cert. denied*, 368 U. S. 900 (1961). Conferences over the changes referred to in those 1959 notices were still going on when the Rutland bulletined the new schedules for the Ogdensburg Subdivision in September 1960.

However, we note that the language in the Rutland's notices was not necessarily inconsistent with the railroad's present contention that it has the right under its existing agreements to change train schedules without negotiation. The November 2, 1959 notices set out a procedure for establishing new runs "which the carrier does not now have the right to establish without agreement with its employees * * *". The notices also state:

"3. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

The Seventh Circuit, faced with the same notices in *Hilbert v. Pennsylvania R. R., supra,* held that the railroad's November 2, 1959, Section 6 notices involved in that case did not turn a subsequent controversy over a proposed change in certain home terminals of the road into a major dispute. Cf. *Pennsylvania R. R. v. Local 2013 of United R. R. Workers,* 178 F. Supp. 53 (E. D. Pa. 1959). We believe a similar situation exists in the case before us. The Section 6 notices created a major dispute, but the dispute so created was not the dispute over which the Rutland's employees went out on strike ten and one-half months later. Although there is an apparent similarity between the changes proposed in the notice given by the Rutland on November 2, 1959, and the schedule changes which the railroad later made unilaterally, the court below found that the railroad in making the September 1960 changes was not acting pursuant to the earlier notices. We cannot say that the district court was in error in so finding.

Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F. 2d 54 (9 Cir.), cert. denied, 361 U. S. 864 (1959), relied upon by the defendants, is distinguishable from the present case. In that case the railroad issued Section 6 notices in which it first proposed to allocate certain ore loading formerly done by yard crews to main line crews, and, failing to reach agreement with the representatives of its workers thereon it then proposed to reduce the size of the yard crews from five men to three men. Since this second proposal, too, was unacceptable, the railroad announced that the shipper would load its own ore. The

shipper was Anaconda Copper Company, which conveniently happened to own all of the stock of the railroad. The railroad asserted that since the shipper, instead of the carrier, was going to load the ore, the road's dispute with its employees was at an end, and therefore the strike in which its employees were engaged should be enjoined. The court held that the major dispute commenced by the railroad's Section 6 notices continued, for the action taken by the copper company should be imputed to its wholly-owned subsidiary, the railroad. Thus the court there held that the Section 6 notices related to the controversy throughout. That decision turned upon the specific facts in that case relating to the notices and the dispute. Similarly, in the present case, the significance of the Section 6 notices rests to a large extent on what the Rutland Railway intended when it issued the 1959 Section 6 notices and what the management and the employees intended when they subsequently became involved in the 1960 dispute. In the present case, upon a set of facts different from those in *Butte, A. & Pac. Ry.*, we have concluded that the controversy created by the Rutland's Section 6 notices was not the same controversy over which its employees struck in September 1960.

The Rutland Railway points out several provisions in its agreements with the defendant brotherhoods which, the railroad contends, demonstrate that it had the right to act as it did. One such provision is Article 39(a) of its agreement with the Order of Railway Conductors and the Brotherhood of Railroad Trainmen:

> "(a) All vacant or new runs will be posted on the division on which they occur within five (5) days, to close within five (5) days, and to be assigned to the oldest bidder within ten (10) days, merit, fitness and ability to be considered. In case of men being away when run is advertised, when reporting for duty

their claims to the run will be considered if a junior man has been assigned, if such claim, in writing, is made within five (5) days."

The language of Article XXXVII(a) in the carrier's agreement with the Brotherhood of Locomotive Engineers, and that of Article 39(a) in the agreement with the Brotherhood of Locomotive Firemen and Enginemen, is essentially the same as in the article quoted above. Also Article 39(e) in the agreement with the Conductors and Trainmen states:

"(e) When established runs are changed to operate out of different terminals, schedules changed two (2) hours or more, twenty (20) miles or more, or the layover of such runs changed, they will be considered new runs and bulletined as such."

The railroad also calls our attention to Articles 16 and 31 of its agreement with the Conductors and Trainmen, Articles 17 and 51 of the Brotherhood of Locomotive Firemen and Enginemen agreement, and Article XVII in the agreement with the Engineers. None of these provisions by themselves alone bestow upon the railroad the right unilaterally to change train runs and home terminals. But they are some indication that each agreement, taken as a whole, implicitly recognizes such a right in the carrier. As we said earlier in the opinion, the present controversy is over the extent of the railroad's managerial prerogative. The scope of the management's prerogative is often not spelled out in collective bargaining agreements, but the prerogative exists implicitly to some extent in all such agreement. See Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 401 (1950); *Gunther v. San Diego & Ariz E. Ry.*, 198 F. Supp. 402, 408-11 (S. D. Cal. 1961).

The court below found that in general there had been no negotiation in the past between the Rutland and its em-

ployees over changes in train runs. This finding was not clearly erroneous. Across the nation there seems to be no uniform pattern in this matter; some railroads have more latitude to act unilaterally over changes of this sort than do others. See the Presidential Railroad Commission Report (Feb. 28, 1962) at 295.

In a number of cases involving disagreements similar to the one in the present case, courts have classified the disputes as minor. *In the Matter of Hudson & M. R. R.*, 172 F. Supp. 329 (S. D. N. Y.), *aff'd sub nom. Stichman v. General Grievance Comm. of the Bhd. of R. R. Trainmen*, 267 F. 2d 941 (2 Cir. 1959), *cert. denied*, 361 U. S. 928 (1960), see also *cert. denied*, 363 U. S. 843 (revision of runs and use of multiple control cars reducing trainmen jobs); *Norfolk & P. B. L. R. R. v. Brotherhood of R. R. Trainmen*, 248 F. 2d 34 (4 Cir. 1957), *cert. denied*, 355 U. S. 914 (1958) (change of point for reporting to work); *Missouri-K-T. R. R. v. Brotherhood of Locomotive Engineers*, 266 F. 2d 335 (5 Cir. 1959), *reversed on other grounds*, 363 U. S. 528 (1960) (changes in intradivisional runs and away-from-home terminals); *Hilbert v. Pennsylvania R. R.*, 290 F. 2d 881 (7 Cir.), *cert. denied*, 368 U. S. 900 (1960) (reassignment of engineers from one terminal to another); *Baltimore & O. R. R. v. United R. R. Workers*, 271 F. 2d 87 (2 Cir. 1959), *vacated and remanded on other grounds*, 364 U. S. 278 (1960) (abolition of post of oiler on diesel powered tugs).

In the light of the provisions of the collective bargaining agreements, the prior conduct of the parties as found by the trial judge and the decisions in analogous cases, we hold that the existing agreements involved here, reasonably interpreted, may recognize implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960; therefore, we hold that

the ensuing dispute must be viewed by the courts as a minor dispute. Whether the railroad does in fact have the rights it claims, or whether on further analysis it does not is for the Board to determine; on the *ultimate* resolution of this issue we express no opinion. We only hold that for the purpose of defining the extent to which a court may intervene and enjoin a strike the dispute in the present case is to be considered minor as one involving the interpretation of existing agreements.

Our decision is not inconsistent with the Supreme Court's holding in *Order of R. R. Telegraphers v. Chicago & N. W. R. R.*, 362 U. S. 330 (1960). Besides concluding in that case that a controversy over a railroad's proposal to reduce the number of its stations was a labor dispute under the Norris-LaGuardia Act, the Court held that that disagreement between management and labor involved a bargainable issue and that the controversy was a major dispute. We do not say that the issue in the present case is not a bargainable one. We have no doubt that the brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain over future procedures for changing train runs and schedules. We only hold that there is a sufficient indication that the existing agreements have preserved management's right unilaterally to make the schedule changes management intended to make so as to require that the dispute be submitted to the National Railroad Adjustment Board, as provided by the Railway Labor Act.

We are not entirely certain what constituted the basis in the *Chicago & N. W. R. R.* case for the Court's other conclusion that there a major dispute existed. Cf. *Hilbert v. Pennsylvania R. R.*, 290 F. 2d 881, 895 (7 Cir.), *cert. denied*, 368 U. S. 900 (1961). Probably the Court was applying the traditional standards for distinguishing the two

types of disputes, and, on the facts presented to it in that case, concluded that a major dispute was present. On a different set of facts we have found a minor dispute here. But perhaps the Court in *Chicago & N. W. R. R.* was adding a new dimension to the usual criteria for distinguishing major disputes from minor one, that of the magnitude of the effect on working conditions which would result from the proposal by the railroad. But even if the Court was adding this ingredient to its analysis, which we doubt, the controversy before us is still a minor dispute because the proposed schedule changes on the Ogdensburg Subdivision would only affect very few jobs.

The court below did not condition its issuance of the injunction against appellants on a requirement that the railroad maintain the *status quo*. It was certainly within the court's power to impose such a condition. See *Brotherhood of Locomotive Engineers v. Missouri-K-T R. R.*, 363 U. S. 528 (1960); also *United R. R. Workers v. Baltimore & O. R. R.*, 364 U. S. 278 (1960). But likewise it was in the court's discretion to decline to impose conditions. 363 U. S. at 534-35. We find no abuse by the court of its discretionary powers in this area.

Interrelation of the Railway Labor Act and the Norris-LaGuardia Act

In general, the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. § § 101-15 (1958), passed in 1932, deprives federal district courts of jurisdiction to issue injunctions against strikes by employees in labor disputes, § 4(a), 47 Stat. 71 (1932), 29 U. S. C. § 104(a) (1958); allows injunctions to be granted against unlawful acts which will cause irreparable injury only under strict procedural requirements, § 7, 47 Stat. 71 (1932), 29 U. S. C. § 107 (1958); and precludes injunctive relief even when

these stringent requirements are met if the complainant has failed to fulfill, on its part, its legal obligations or has failed, on its part, to make reasonable attempts to settle the labor dispute by negotiation, mediation, or voluntary arbitration, § 8, 47 Stat. 72 (1932), 29 U. S. C. § 108 (1958). See 75 Cong. Rec. 4626, 4629 (1932); *Chicago R. I. & Pac. R. R. v. Switchmen's Union*, 292 F. 2d 61 (2 Cir. 1961), *petition for cert. filed*, 30 U. S. L. Week 3036 (U. S. July 19, 1961) (No. 237). This statute embodies a policy of fostering the resolution of labor difficulties through the interplay of private forces unhampered by judicial interference. See S. Rep. No. 163, 72d Cong., 1st Sess. 18 (1932); H. R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932). The draftsmen of the Norris LaGuardia Act had before them the 1926 provisions of the Railway Labor Act, which included most of the present procedures for settling major disputes, the provisions for disposing of minor disputes through voluntary local boards, and Section 2 First and Second, 44 Stat. 577 (1926), 45 U. S. C. § 152 First and Second (1958), which imposed on both management and labor the duty to confer over any dispute. All of these provisions channeled, but did not eliminate, the operation of private forces in the determination of labor disputes. See *Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50, 58-59 (1944); *cf.* 75 Cong. Rec. 4505-10, 4618-26, 5462-515 (1932). Subsequent labor legislation, however, including the 1934 amendments to the Railway Labor Act which provided for official adjudication of certain labor disputes by the National Railroad Adjustment Board, reflected a policy of interpositioning greater governmental participation in labor relations. See Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354, 356 (1958). To accommodate the differing policies underlying the Norris-

LaGuardia Act and the Railway Labor Act is not an easy task. In *Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R.*, 353 U. S. 30, 40 (1957), the Supreme Court stated:

> * * * the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

On numerous occasions courts have issued injunctions in labor disputes despite the apparently categorical language of the Norris-LaGuardia Act. In *Virginian Ry. v. System Fed'n 40*, 300 U. S. 515 (1937), a labor union which had been certified by the National Mediation Board obtained an injunction against a railroad commanding the road to deal with it and not to interfere with the employees' choice of a bargaining representative. In a series of cases the Supreme Court has held that railroad unions may be enjoined from showing discrimination in their representation of railroad employees. *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U. S. 210 (1944); *Graham v. Brotherhood of Locomotive Firemen*, 338 U. S. 232 (1949); *Brotherhood of R. R. Trainmen v. Howard*, 343 U. S. 768 (1952); *Conley v. Gibson*, 355 U. S. 41 (1957). See also *Steele v. Louisville & N. R. R.*, 323 U. S. 192 (1944) (arising in a state court where Norris-LaGuardia Act was inapplicable). See also *Railroad Yardmasters of America v. Pennsylvania R. R.*, 224 F. 2d 226 (2 Cir. 1953). See, generally, *Chicago, R. I. & Pac. R. R. v. Switchmen's Union, supra; American Airlines, Inc. v. Air Line Pilots Ass'n*, 169 F. Supp. 777, 785-87 (S. D. N. Y. 1958).

In *Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R.*, 353 U. S. 30 (1957), the Supreme Court held

that the Norris-LaGuardia Act did not preclude a federal court from enjoining a strike which might defeat the effectiveness of the National Adjustment Board's authority to adjudicate a minor dispute. The Court concluded first, that Congress had intended the proceeding before the Adjustment Board to be a reasonable substitute for self-help and second, that the earlier and more general language of the Norris-LaGuardia Act should give way to the later specific provisions of the 1934 amendments to the Railway Labor Act. For cases in which lower courts have enjoined strikes in such situations, see *supra* at p. 2092. In the present case, as in the *Chicago River* case, a minor dispute is involved, the railroad has submitted the matter to the Railroad Adjustment Board, and we follow the lead provided for us in that case and its progeny. We hold that an injunction is properly issuable in order to enforce compliance with the requirement of the Railway Labor Act that a minor dispute is to be heard and determined by the National Railroad Adjustment Board.[8] Cf. *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 457-59 (1957).

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[8] In 1960 the Supreme Court again spoke on the relationship between the Norris-LaGuardia Act and the Railway Labor Act. *Order of R. R. Telegraphers v. Chicago & N. W. R. R.*, 362 U. S. 330 (1960). The Court held that Section 4 of the Norris-LaGuardia Act withdrew jurisdiction from the federal court to enjoin the strike involved in that case. The Court discovered no provision of the Railway Labor Act which made the strike unlawful and concluded that there the dispute was a major one. That case is distinguishable from the present one for the labor dispute here is a minor dispute. The Supreme Court in *Chicago & N. W. R. R.*, though holding that the strike there could not be enjoined, recognized that federal courts could enjoin strikes arising out of minor disputes. 362 U. S. at 341. Moreover, a strike which would frustrate the procedures created by the Railway Labor Act for the final determination of such disputes would be unlawful. Cf. *Chicago, R. I. & Pac. R. R. v. Switchmen's Union*, 292 F. 2d 61 (2 Cir. 1961), petition for cert. filed, 30 U. S. L. Week 3036 (U. S. July 19, 1961) (No. 237).

But what significance for the case before us have Section 2 First, Second, and Sixth of the Railway Labor Act and Section 8 of the Norris-LaGuardia Act? Section 2 First and Second impose a duty on both parties to make every reasonable effort to settle a dispute, whether it be major or minor, and, as a part of their efforts, to confer over their differences.[9] Section 2 Sixth provides the procedure for calling a conference to discuss a minor dispute. These conferences are to take place before a submission of the dispute to the Railroad Adjustment Board. § 3 First (i), 48 Stat. 1189 (1934), 45 U. S. C. § 3 First (i) (1958); *Elgin J. & E. Ry. v. Burley*, 325 U. S. 711 (1945); *Brotherhood of R. R. Trainmen v. Chicago River & Ind. R. R.*, *supra* at 33. Section 2 First, Second and Sixth were already part of the Railway Labor Act when the Norris-LaGuardia Act was passed.

Section 8 of the Norris-LaGuardia Act states:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

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[9] These sections provide in pertinent part:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort * * * to settle all disputes, whether arising out of the application of such agreements or otherwise, * * *

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, and in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 8 thus imposes two different requirements on one who seeks injunctive relief in a labor dispute. He must comply with all his legal obligations relevant to the dispute and, further, he must make every reasonable effort to settle the dispute by the methods enumerated. *Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50 (1944). This is known as the "clean hands" provision of the Norris-LaGuardia Act. See 75 Cong. Rec. 5464 (1932).[10]

Since section 2 First, Second and Sixth of the Railway Labor Act were enacted before the Norris-LaGuardia Act, the rule of thumb upon which courts too often rely that the scope of earlier and more general legislation must always be reconsidered in the light of more specific provisions appearing in subsequent legislation does not help in deciding the present question. Moreover, the purpose of the Railway Labor Act § 2 First, Second and Sixth and the purpose of the "clean hands" provision of the anti-injunction statute are not so inconsistent that it is impossible to accommodate one to the other.

In *Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R., supra,* the Supreme Court held that under section 8 of the Norris-LaGuardia Act a railroad was not entitled to an injunction against a strike because the road had refused to submit to voluntary arbitration, an available method for settling the dispute there involved. In *Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen & Enginemen,* 268 F. 2d 54 (9 Cir.), *cert. denied,* 361 U. S.

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[10] The extent to which the Supreme Court has gone to enforce compliance with this provision of the Norris-LaGuardia Act is seen in *Brotherhood of R. R. Trainmen v. Toledo, P. & W. R. R.*, 321 U. S. 50 (1944), in which the Court reversed an order granting injunctive relief to a complainant that had not complied with section 8, and this despite the fact that the acts complained of had caused violence.

864 (1959) (alternative holding) the Court of Appeals for the Ninth Circuit held that an anti-strike injunction had to be denied under the Norris-LaGuardia Act because the railroad had abandoned the procedures of the Railway Labor Act for settling the major dispute in that case. Although both of these cases involved major disputes, we believe their treatment of the relationship between section 8 of the Norris-LaGuardia Act and the procedures set up by the Railway Labor Act for settling railway labor disputes is applicable to the case before us. See *Butte A. & Pac. Ry. v. Brotherhood of Locomotive Firemen & Enginemen, supra*, at n. 10. Cf. *East Texas Motor Freight Lines v. International Bhd. of Teamsters*, 163 F. 2d 10 (5 Cir. 1947).[11]

Reading the relevant sections of the Railway Labor Act together with the "clean-hands" provision of the Norris-LaGuardia Act, and remembering that the dispute here is a minor dispute, we observe that an applicant for an injunction (1) must comply with all legal obligations required of it including the making of every reasonable effort to settle the dispute by conference and (2) must make every reasonable effort to settle the dispute by negotiation.[12] We are not certain whether the draftsmen intended different concepts by the words "conference" and "negotiation." See *Brotherhood of R. R. Trainmen v. Toledo, P.*

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[11] In *Chicago, R. I. & Pac. R. R. v. Switchmen's Union*, 292 F. [illegible], 66 (2 Cir. 1961), petition for cert. filed, 30 U. S. L. Week 3036 (U. S. July 19, 1961) (No. 237), it was suggested that a union which failed to comply with the Railway Labor Act § 2 First, Second might be subject to an anti-strike injunction. The present case involves the converse situation. The railroad, perhaps, has failed to comply with those provisions, and, therefore, under § 8 of the Norris-LaGuardia Act, if its failure is shown, it may be deprived of injunctive relief as long as it continues in its dereliction. See also *Long Island R. R. v. Brotherhood of R. R. Trainmen*, 185 F. Supp. 356 (E. D. N. Y. 1960).

[12] Mediation and voluntary arbitration are only relevant for major disputes.

& *W. R. R., supra,* at 61. However, we find that in applying these terms to the present controversy a distinction should be drawn between the duty to negotiate and the duty to confer. We construe "negotiation" to mean full-scale discussion and disputation. We construe "conferring" to mean activity of a similar type to negotiation but activity requiring a lesser output of time and of energy. We must make this distinction in the present case because of the nature of the issue which divides the parties. The basic dispute is whether the railroad under its existing agreement must *negotiate* before it reschedules the runs on the Ogdensburg Subdivision. If the railroad were required by statute to negotiate this issue before it submitted the dispute to the Adjustment Board, the result would be to require the railroad to negotiate with employee representatives over whether it should negotiate with them —a solution sounding a lot like an exercise in theoretical logic. We think in practice it would be virtually impossible for the parties to negotiate whether they would negotiate about the rescheduling without actually negotiating about the rescheduling itself. Thus the brotherhoods would immediately achieve what they are only entitled to obtain after adjudication of the dispute by the Railroad Adjustment Board. Therefore, we hold that any requirement in section 8 of the Norris-LaGuardia Act that a railroad negotiate before obtaining an injunction is superseded by the statutory scheme in the Railway Labor Act that gives the Adjustment Board the power to decide whether there should be any negotiation at all between management and the brotherhoods.

But in minor disputes involving the scope of the managerial prerogative it must be that Section 2 First, Second and Sixth of the Railway Labor Act together with the Norris-LaGuardia Act impose some lesser duty on a rail-

road which seeks injunctive relief. Otherwise, in any minor dispute in which a railroad can contend that the question is one committed to managerial prerogative, the railroad will be tempted not to try to reach a private understanding with the representatives of its employees, a result inconsistent with one of the fundamental policies of the Railway Labor Act. See *Brotherhood of R.R. Trainmen v. Toledo, P & W., supra; Gunther v. San Diego & Ariz. E. Ry.*, 198 F. Supp. 402 (S. D. Cal. 1961). Therefore, we hold that the relevant sections of the Railway Labor Act and the Norris-LaGuardia Act impose a duty upon a railroad, short of negotiation, to take some reasonable steps toward dispute settlement before it can obtain an anti-strike injunction. These lesser efforts are comprehended within the concept of "conferring." It is not easy to state exactly what the railroad must do in cases in which it must confer but need not negotiate. In each case the district judge must apply his experience and good sense to the specific circumstances of the case. However, certain minimum steps can be suggested for the usual case. Unfair surprise should be avoided whenever possible. The representatives of management should meet with those of labor. Each side should listen to the contentions of the other side and each side should explain its position clearly and honestly, but not for as long a time as is customary in full-scale bargaining. In short, men of good faith must in good faith get together in a sincere effort to resolve their differences. Cf. *Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R.*, at n. 18; *Brotherhood of Ry. Clerks v. Atlantic Coast L. R.R.*, 201 F. 2d 36, 40 (4 Cir.), *cert. denied*, 345 U. S. 992 (1953); *American Airlines, Inc. v. Air Line Pilots Ass'n*, 169 F. Supp. 77 (S. D. N. Y. 1958); *Long Island R.R. v. Brotherhood of R.R. Trainmen*, 185 F. Supp. 356 (E. D. N. Y. 1960). See also *NLRB v.*

Wooster Division of Borg-Warner Corp., 356 U. S. 342 (1958); *NLRB v. Truitt Mfg. Co.*, 351 U. S. 149 (1956); *NLRB v. Insurance Agents' International Union*, 361 U. S. 477 (1960).

In the present case the district court made no finding whether the management of the railroad made the good faith efforts which we have held to be a prerequisite to the obtaining by it of injunctive relief. The telegram that the railroad sent to the brotherhoods on September 15 stated "Conferences on this issue have not been held on the property with the [brotherhoods]." However, the railroad claimed at the hearing that its representatives met with representatives of the brotherhoods on September 9 and on September 16. We cannot determine from the record alone, without the benefit of observing the witnesses, whether the extent of these discussions met the standard we find is imposed by the Railway Labor Act.

If in fact the railroad has failed to take the steps required of it by the Railway Labor Act, it is not entitled to injunctive relief against the strike of its employees. *Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen*, 268 F. 2d 54 (9 Cir.), cert. denied, 361 U. S. 864 (1959). Therefore, we must remand the case for the district court to determine whether the railroad made reasonable efforts to settle this dispute in conference. See *Pennsylvania R.R. v. Transport Workers Union*, 178 F. Supp. 30 (E. D. Pa. 1957) (Finding No. 15), *appeal dismissed*, 278 F. 2d 693 (1960). If the district court finds that the railroad has not done so, it should not issue the injunction until the railroad has perfected its right to such relief by compliance with its statutory obligation.

We believe that this disposition accommodates the purposes of both statutes. Except for the creation of the Railroad Adjustment Board, the policy behind both stat-

utes is to facilitate the private settlement of labor disputes, see *Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R.*, 321 U. S. 50, 58 (1944); *Dwellington v. Thompson*, 91 F. Supp. 787 (D. Mo. 1950), *aff'd sub nom. Rolfes v. Dwellington*, 198 F. 2d 591 (1952). Furthermore, it connot be said that this result subverts the jurisdiction of the National Railroad Adjustment Board because efforts privately to settle a dispute are required by the Railway Labor Act itself before submission of the dispute to the Adjustment Board.

Our decision is consistent with the Supreme Court's ruling in *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., supra.* In that opinion, especially at footnote 24, the Court concluded that because the Railway Labor Act created the Railroad Adjustment Board to decide the merits of minor disputes with finality, Section 8, like the other provisions of the Norris-LaGuardia Act, did not bar injunctive relief. But the Court did not address itself to the relationship of section 8 to those provisions of the Railway Labor Act which, without regard to the type of dispute involved, call for private conference in an effort to adjust the differences between the parties prior to governmental intervention. Therefore, that decision is not relevant to this part of our opinion. See discussion in *Chicago R. I. & Pac. R.R. v. Switchmen's Union, supra*, at 66, as to the scope of the decision in the *Chicago River & Ind. R.R.* case.[13]

Reversed and remanded for further proceedings not inconsistent with this opinion.

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[13] The defendants also assert that the railroad is not entitled to an injunction because it has not complied with the non-statutory duty of clean hands imposed on all who seek to invoke the jurisdiction of a court of equity. We believe that in the present case the scope of this non-statutory obligation is no greater than the statutory obligation imposed by Section 8 of the Norris-LaGuardia Act.

MARSHALL, *Circuit Judge* (dissenting):

With deference to my brothers, I deem the issues raised by the present case to be of such importance that a statement of my dissenting views is necessary. Because the "Section 6" and contract termination notices served by Rutland were also issued by most of the Class I railroads in the country, the factual pattern before us is of national importance. Much of what the majority says seems to me not only well put but also quite correct. I do not disagree with their treatment of the venue problem, with most of their general statements as to when a strike is legal or illegal under the Railway Labor Act, or with the assertion that a "labor dispute" is involved in this case. I strongly disagree, however, with the result they reach and would suggest that much of what they say is actually inconsistent with that result.

The majority correctly states the principal issue to be whether the dispute between the parties was "major" or "minor" under the Railway Labor Act. That proposition, however, is of such generality that it fails to pose the problems we must solve in any meaningful fashion. The legal dispute here involves two questions. First, what procedures must a party to a collective agreement in the railroad industry follow in order to terminate that agreement or any part thereof? [1] Second, the termination having been accomplished, under what circumstances may the parties resort to economic force?

My position, briefly summarized, is that Rutland voluntarily terminated so much of the collective agreement

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[1] This seems to me to be the principal issue in the case since I would agree that if the relevant contractual provisions had not been terminated, the decision would be clearly governed by *Brotherhood of R. Trainmen v. Chicago R. & I. Ry.*, 353 U. S. 30 (1957).

as might be said to govern the establishment of new runs and the merging or elimination of crew terminals and, then, believing that it could not secure what it desired through the normal processes of collective bargaining, violated the plain mandates of the Railroad Labor Act's major dispute procedures by unilaterally changing certain runs and terminals. This action should have been enjoined by the District Court. It does not follow that a strike to prevent such changes was justifiable, however, since, in my view at least, a remedy in the courts was available to the union and should have been resorted to. I would, therefore, have enjoined both Rutland and the Brotherhoods from engaging in self-help until exhaustion of the major dispute procedures.

The majority conclusion is radically different. They hold explicitly that the agreement insofar as it dealt with the establishment of runs and terminals was not terminated and *sub silentio* that there was in fact no way in which to terminate it. They enjoin the union's use of economic force, therefore, pending exhaustion of the drawn-out minor dispute procedures and leave Rutland free to act unilaterally.

The words "major" and "minor" have no intrinsic legal significance. They are derived from the terminology of railway industrial relations and are used judicially merely as a shorthand way of referring to a distinction incorporated in the structure of the Railway Labor Act. The statute, itself, however, does not use the words. The distinction is of legal significance solely because the Act establishes mutually exclusive mandatory procedures to be followed in resolving two different kinds of disputes.

Disputes involving grievances or contract interpretation questions are to be handled under Section 3 First.[2]

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[2] 45 U. S. C. A. § 153 First.

Under that provision either party may submit the dispute to the appropriate Adjustment Board for a "final and binding" decision on the meaning of the contract. A strike over disputes properly submitted to the Adjustment Board may be enjoined in order to protect the Board's jurisdiction. *Brotherhood of R. Trainmen v. Chicago River & Ind. R. Co.* 353 U. S. 30 (1957). And, in appropriate circumstances, the enjoining court may condition the strike injunction upon preservation of the *status quo* by management pending final adjudication by the Board. *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co.*, 363 U. S. 528 (1960).[3]

But labor contracts in the railroad industry do not continue in force *in perpetuum* unless both parties so desire. Like many familiar agreements, they are subject to termination and change, a process which, when invoked by a party,[4] is characterized as a major dispute.

While the Act provides for compulsory arbitration of minor disputes, it leaves the resolution of major disputes to free collective bargaining and the use of economic force subject only to certain mandatory procedural requirements. Section 6[5] governs the procedure to be followed in changing agreements affecting working conditions. Any party desiring such a change must give 30 days written notice to the other party. Either party may then request

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[3] Even though the majority believes a minor dispute is involved, it does not discuss the applicability of that decision to this case. Since I cannot agree this is a minor dispute, I shall also forego discussion.

[4] Presumably, a palpable breach of contract would be in violation of Section 6, see note 5, *supra*, and accompanying text, which requires 30 days written notice of an intended change in agreements and would therefore, also create a major dispute. Cf. *Railroad Yardmasters of America v. Pennsylvania R. Co.*, 224 F. 2d 226 (3 Cir. 1955).

[5] 45 U. S. C. A. § 156.

the services of the Mediation Board or the Board may step in on its accord under Section 5.[6] Under Section 6 "rates of pay, rules or working conditions shall not be altered" until final action by the Mediation Board under Section 5. Section 5 prohibits changes in "rates of pay, rules, or working conditions or established practices" until 30 days after the Board has notified the parties of the failure of its mediatory efforts. Section 10[7] empowers the President to establish an emergency board after the failure of mediation efforts and provides "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" until thirty days after the Board makes its report to the President. The legislative history indicates that when the rail unions and carriers agreed upon these provisions, the unions surrendered their right to strike pending exhaustion of major dispute procedures in exchange for a statutory provision restraining management from disturbing the *status quo*.[8] These "freeze"[9] or "cooling-off"[10] provisions have been held to be enforceable by the courts. *Grand International Brotherhood v. Morphy*, 109 F. 2d 576 (2 Cir. 1940); *cert. denied* 310 U. S. 635 (1940); *Railroad Yardmasters v. Pennsylvania R. Co.*, 224 F. 2d 226 (3 Cir. 1955).

No provision is made, however, for the compulsory resolution of substantive issues in major disputes, and the parties are free to resort to economic force after exhaust-

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[6] 45 U. S. C. A. § 155.

[7] 45 U. S. C. A. § 160.

[8] 67 Cong. Rec. 4524, 4588. See also comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 Colum. L. Rev. 381, 388 (1960).

[9] *Chicago, Rock Island & Pac. R. Co. v. Switchmen's Union*, 292 F. 2d 61, 66 (2 Cir. 1961).

[10] 67 Cong. Rec. 4648, 4650.

ing the procedures. *Chicago River, supra*, at fn 24; *Order of R. Telegraphers v. Chicago & N. W. R. Co.*, 363 U. S. 330 (1960). See also *Chicago, Rock Island and Pac. R. Co. v. Switchmen's Union*, 292 F. 2d 61 (2 Cir. 1961).

Within this legal framework, I fail to grasp how the factual pattern here presents the difficulties encountered by the majority. On November 2, 1959, Rutland served notice on the Brotherhoods "under our existing agreements and pursuant to the provisions of the Railway Labor Act" that it wanted a new contract, "effective January 1, 1960," which would in effect eliminate all "agreements, rules, regulations, interpretations and practices, however established," restricting the carrier's right to establish new runs and which would also explicitly "[e]stablish a rule to provide that * * * [t]he carrier shall have the right to establish, move, consolidate and abolish crew terminals * * * with the right to operate any * * * run * * * through established crew terminals." This was a 30 day notice of termination of all contractual provisions, explicit or implied, relating to the establishment of new runs and crew terminals. Rutland, by thus invoking Section 6 of the Act, and the termination provisions of the contracts, notified the Brotherhoods that it desired not only to terminate all restrictive provisions, practices and even all ambiguities as to the establishment of new runs but also that it wanted an explicit provision incorporated in a new agreement which would bestow upon it the absolute prerogative to change crew terminals. Rutland thereby voluntarily terminated the old agreement to this extent and invoked the major dispute procedures. Having invoked them, presumably it was bound by them.

Nevertheless, on September 8, 1960, before exhaustion of the major dispute procedures, Rutland announced that it intended unilaterally to establish new runs thereby

changing certain crews terminals and to operate these runs through other established terminals. Since the major dispute procedures require that the carrier not change "working conditions," "established practices," or the "conditions out of which the dispute arose" until their exhaustion, Rutland's action was a plain violation of the Railway Labor Act.[11] The Brotherhoods called a strike because of the unilateral changes announced by Rutland and were enjoined by the District Court.

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[11] Arguably, these provisions might be read merely to mean that the collective agreement, with all its ambiguities, is to remain in force pending exhaustion of the major dispute procedures. Under that view, minor disputes could occur during that period and might involve the subject matter of the major dispute. In such a case, however, the union would still be free to strike over the issue after exhaustion of the major dispute procedures. A contrary holding would mean that ambiguous terms in a collective agreement would not be subject to change through collective bargaining until their meaning had been determined by the Adjustment Board. This would effectively lengthen the term of the contract beyond the intentions of the parties and would prohibit clarification through collective bargaining of those contractual provisions which need it most. It would, moreover, seem directly contrary to the intent of Section 6 which contemplates the proposal of changes in agreements whenever the parties desire and which contains no provisions restraining its use until an Adjustment Board decision has been rendered on the meaning of the old contract.

In any case, the preferable view is that changes in existing conditions which are the subject of a major dispute are forbidden whether or not they are arguably authorized by the collective agreement. The "freeze" provisions carefully avoid reference to the collective agreement, but emphasize "working conditions" (Section 6), "established practices" (Section 5), and "conditions out of which the dispute arose" (Section 10). This is in contrast to other parts of the Act, and indeed, Section 6 itself, which refer directly to the "agreement" when necessary. Moreover, the legislative history of the statute shows the "freeze" provisions were intended to enforce a "cooling off" period upon both labor and management in the railroad industry. See Note 10, *supra*. But this policy cannot be effectuated if management is allowed to take advantage of an ambiguous contract during the "freeze" to make changes in working conditions relating to the dispute. Such action is far more likely to warm up the dispute than cool it off.

In reviewing that action, I should have thought the principal question would be whether the union was free to strike against Rutland's illegal actions or whether the conduct of both parties in derogation of the major dispute procedures must be enjoined. On balance, I would have adopted the latter course both on the grounds that resort to the courts is generally preferable to this kind of self help[12] and on the further grounds that the "cooling off" policies of the major dispute procedures cannot be effectuated by allowing both parties simply to do away with the Act. These problems have become irrelevant, however, for the majority has concluded that the dispute is minor and must be resolved by an Adjustment Board determination of the meaning of the old agreement.

One reason asserted by the majority in support of this result seems to be that the Section 6 notice was not sufficiently broad to cover the matters in dispute. Two quotations from the notice are set out, apparently to demonstrate that it was intended only to do away with restrictions on the managerial prerogative to establish new runs. The majority then finds there are no *explicit* restrictions in the agreements, and, therefore, the Section 6 notice does not encompass this dispute. But if all this is true, why did Rutland serve notices pursuant to Section 6 and the various contracts in the first place? Plainly, Rutland's purpose was to eliminate the ambiguities[13] in the agreement

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[12] Cf. *Local 33, Bakery Sales Drivers v. Wagshal*, 333 U. S. 437 (1948); *Dorchy v. Kansas*, 272 U. S. 306 (1926); but see *Mastro Plastics Corp. v. N. L. R. B.*, 350 U. S. 270 (1956).

[13] Existing ambiguities in a document cannot be cured by the continued silence of the parties. Obviously, therefore, Rutland's notice contemplated insertion of new provisions which would either affirmatively establish its prerogatives or would direct the Adjustment Board to follow a rule of construction which would prevent "interpretations" from infringing on these rights. Either course would require a new provision and a "change" in the existing agreements.

which the majority admits exist and in fact relies upon in sending this case to the Adjustment Board. I have not found any language in the statute or policy behind it which would prohibit or nullify this use of Section 6 in the manner suggested by the majority. I believe that clarification through collective bargaining of ambiguous contractual provisions is a most laudable purpose and should be encouraged rather than hampered by the courts. Moreover, the majority inexplicably ignores paragraph B(1) of the notice. That paragraph explicitly notifies the unions that Rutland seeks to "Establish a rule to provide that * * * 1. The Carrier shall have the right to establish, move, consolidate and abolish crew terminals * * *" Surely a request to incorporate a comprehensive clause such as this must be said to change an ambiguous contract or an agreement containing no such explicit provision. That paragraph B(1) encompasses the dispute here is plainly evident, for the majority itself states the present "disagreement * * * [is] whether the management of the railroad had the right to * * * change crew terminals."

The majority states the "major-minor" distinction in the following fashion:

> It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is an ambiguous, but clearly governing, provision in the present agreements or if what the railroad seeks to do may reasonably be implicit within the customary and ordinary interpretations of the language of the agreements.

While this might be a correct statement of the law in the absence of a Section 6 notice, I would suggest that it is

entirely erroneous once such a notice has been served. The majority opinion itself at one point concedes that major disputes commence with notice under Section 6. Moreover, it must be so, for under the Railway Labor Act a party is free to terminate an ambiguous contract in the hope of making it explicit without going to an Adjustment Board for a determination of its meaning. This is precisely what Rutland attempted to do. The reliance placed by Rutland and the majority upon the collective agreement is utterly inconsistent with the Section 6 notice, for Rutland intended by that notice to terminate and do away with the very same contractual provisions which are now so strenuously relied upon. And, the inconsistency of relying on these provisions is magnified since the notice was also based upon the termination clauses of the same agreements. I dare say that if this were a commercial contract with a 30 day termination provision, we would not show such solicitude for one who invoked the termination procedures but later claimed the agreement was still in effect when the other party refused to meet his demands for a new contract.

But the significance of today's decision transcends the immediate and hopefully temporary problems of the Rutland Railroad and its employees. There is much in the majority opinion which implies there cannot be a major dispute if the relevant agreement contains "an ambiguous, but clearly governing, provision," regardless of whether a Section 6 notice has been served. The quotation in the preceding paragraph seems to be to that effect. Along the same lines, reliance is placed upon "a number of cases involving disagreements similar to the one in the present case, [in which] courts have classified the disputes as minor." In all but one, however, there was no effective

Section 6 notice and, therefore, no effective termination of the agreement.[14] The Railway Labor Act establishes a system of free collective bargaining, Section 6 being an integral part of that system. It is designed to allow either party to terminate an agreement, whether or not its meaning is clear, and bargain freely over new provisions subject only to certain procedural requirements. To hold that Section 6 is rendered inoperative if there is "an ambiguous, but clearly governing, provision in the present agreements" is to give it an effect precisely opposite to that intended and to deprive the parties of their right to bargain freely.

The dilemma created by the majority opinion is neatly posed when it says, "[T]he brotherhoods, upon the expiration of the existing agreements, may require the railroad to bargain" over the issues in dispute. But the only manner in which the existing agreements may "expire" is through notice pursuant to Section 6 by one of the parties, since none of these contracts contains a fixed

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[14] *In the Matter of Hudson & M. R. Co.*, 172 F. Supp. 329 (S. D. N. Y. 1959), *aff'd per curiam sub nom. Stichman v. General Grievance Comm. of the Bhd. of E. Trainmen*, 267 F. 2d 941 (2 Cir. 1959) *cert. denied* 363 U. S. 843 (1960) (proposal to amend the agreement withdrawn); *Norfolk & P. B. L. R. v. Brotherhood of R. Trainmen*, 248 F. 2d (4 Cir. 1957) *cert. denied* 355 U. S. 914 (1958). (no section 6 notice); *Missouri-Kansas-Texas R. Co. v. Brotherhood of Locomotive Engineers*, 266 F. 2d 335 (5 Cir. 1959) *rev'd on other grounds* 363 U. S. 528 (1960) (no section 6 notice); *Baltimore & O. R. Co. v. United R. Workers*, 271 F. 2d 87 (2 Cir. 1959) *vacated and remanded on other grounds* 364 U. S. 278 (1960) (no section 6 notice). Of the cases cited by the majority, only *Hilbert v. Pennsylvania R. Co.*, 290 F. 2d 881 (7 Cir. 1961) *cert denied* 368 U. S. 900 (1960) involved a Section 6 notice. I would submit that decision is erroneous.

The majority omits one decision involving a dispute "similar to the one in the present case." *Order of R. Telegraphers v. Chicago & N. W. R. Co.*, 363 U. S. 330 (1960). A Section 6 notice *was* involved in that case, and the Supreme Court found it to be a major dispute. See Note 18, *infra*, and accompanying text.

expiration date.[15] Presumably, if the union had, on November 2, 1959, issued a Section 6 notice stating its desire to "eliminate all agreements, rules, regulations, interpretations and practices, however established, *allowing* the carrier to establish new runs *without the union's consent*" and to "establish a rule that the carrier shall *not* have the right to establish, move, consolidate crew terminals or to operate any runs through established crew terminals, *without the union's consent*," the majority's ruling would not vary.[16] Yet that is not significantly different from *Order of R. Telegraphers v. Chicago & N.W. R. Co.*, 363 U. S. 330 (1960), in which the Supreme Court held that a major dispute existed. While the majority is "not entirely certain" as to the basis of that decision, I would submit the governing consideration must have been the Section 6 notice.[17] Otherwise, the case would have been

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[15] Each contract provided that it was to remain in effect until changed in accordance with the Railway Labor Act. The thrust of the majority's decision, therefore, is to eliminate the possibility of termination and to restrict the freedom of the parties to bargain collectively.

[16] Since there is no explicit grant to the carrier of these rights and there is an "ambiguous, but clearly governing, provision," the majority's criteria for determining that a minor dispute exists would be satisfied. Surely the fact that the carrier gave the notice here does not serve to distinguish the two cases. That factor, if anything, would help the brotherhoods.

[17] The majority is correct in stating that the magnitude of the effect upon working conditions is not the governing factor. The statute itself does not use the words major and minor and, therefore, provides no standards for judging the magnitude. Adoption of such a test would engulf us in sterile inquiries such as when does a little dispute on a big railroad become a big dispute on a little railroad. On the one hand, it might tip the tactical balance by allowing management the protection of the equity arm of the federal courts so long as it bit off a little at a time and did not attempt to get everything in one gulp. On the other hand, a literal application of major and minor might encourage the unions to strike over every dispute simply to show how big it was.

indistinguishable from the Court's decision in *Chicago River, supra,* and all the other cases which have followed it. E.g. cases cited in note 14, *supra*. The most profitable inquiry for the majority is not how to distinguish *Chicago and N.W. Ry.* from this case but how to distinguish it from all the cases finding minor disputes. Viewed from that perspective, the "uncertainty" vanishes. In any case, *Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen,* 268 F. 2d 54 (9 Cir. 1959), *cert. denied,* 361 U. S. 864 (1959) is precisely on point and explicitly supports my view of the statute. I do not grasp how it may be disposed of simply by asserting the facts are different.[18] As for *Hilbert v. Pennsylvania R. Co.,* 290 F. 2d 881 (7 Cir. 1961), *cert. denied,* 368 U. S. 900 (1961), relied on by the majority, I would decline to follow it since it also seems based on the erroneous notion that Section 6 is inoperative when the existing agreement is ambiguous.

My reading of the statute and of subsequent judicial interpretations leads me to believe the majority has adopted a view which does much violence not only to our policies of free collective bargaining but also to traditional notions of freedom of contract. I must, therefore, dissent.

JUDGMENT OF THE COURT OF APPEALS.

(Entered June 18, 1962.)

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

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[18] *Butte* differs from our ruling in *Stichman*, note 14 *supra*, as to the effect of a withdrawal of a Section 6 notice. The notice here, however, was not withdrawn.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this Court; with costs to the appellants.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 380.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

RUTLAND RAILWAY CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 380.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated association, individually and as representative of the locomotive engineers employed by plaintiff; and A. S. MCCARTHY, individually and as General Chairman of said organization; BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association individually and as representative of the locomotive firemen and enginemen employed by plaintiff; and RICHARD DAVIES, individually and as General Chairman of said organization; BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, individually and as representative of the brakemen employed by the plaintiff; and F. J. ESPOSITO, individually and as General Chairman of said organization; ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association, individually and as representative of the conductors employed by the plaintiff; E. K. STONE, General Chairman, and R. H. BROWN, individually and as Local Chairman of said organization,

Petitioners,

v.

RUTLAND RAILWAY CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Counterstatement of Questions Presented.

1. Should this Court entertain a petition for certiorari now, the Court of Appeals having directed the District Court to make further findings of fact (as to "whether the railroad made reasonable efforts to settle this dispute") which findings, if decided affirmatively, would require further hearings (as to the damages to be assessed) before it

can be determined whether any of the issues here present will survive for review at that time?

2. Did the courts below correctly conclude that, for venue purposes, those petitioners who are unincorporated associations resided within the judicial district of Vermont because they did business and carried on substantial activities within that judicial district?

3. Did the courts below correctly conclude that the present case arose out of the interpretation or application of existing collective bargaining agreements and, therefore presented a *minor* dispute as that term has been used in applying the Railway Labor Act?

4. Did the courts below correctly conclude that the notice which respondent had served November 2, 1959 under Section 6 of the Railway Labor Act seeking future changes in existing agreements bore no relation to the *minor* dispute of September, 1960 over the scope and application of the existing agreements which resulted in the strike on September 16, 1960?

5. Did the courts below correctly conclude that an injunction could properly issue to protect the jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act to hear and determine such a *minor* dispute which had been submitted to and accepted by it and that such injunction accommodates the applicable provisions of the Norris-LaGuardia Act?

Counterstatement of the Case.

Respondent agrees with the recitals as to the opinions below and with the jurisdictional statement set forth at page 2 of the Petition. However, respondent believes that

petitioners' statement of the case is not wholly accurate.[1] For example, at page 6 of the Petition, it is stated that prior to the instant dispute management had recognized on many occasions its duty to negotiate on the establishment of new runs and changes in runs and that it had never changed a terminal without negotiations and agreement with the Brotherhoods. Quite to the contrary, the District Court found:

> "Since January 1, 1953, on the Ogdensburg subdivision, there have been thirty-two changes of train runs or schedules instituted by the plaintiff. With one or two exceptions, none of these changes were held up pending negotiations between plaintiff and defendants." (Vol. I p. 74-a and see Vol. I p. 84-a)

The Court of Appeals found:

> "The court below found that in general there had been no negotiation in the past between the Rutland and its employees over changes in train runs. This finding was not clearly erroneous. Across the nation there seems to be no uniform pattern in this matter; some railroads have more latitude to act unilaterally over changes of this sort than do others." (App. pp. 28-29)

Respondent's statement of the case follows:

Rutland Railway Corporation (hereinafter referred to as "Rutland") is a Vermont railroad corporation which

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[1] The appendix to the petitioners' brief in the court below has been designated as Volume I and contains pages 1a-85a. Respondent's appendix in the court below has been designated Volume II and contains pages 1a-95a. Added to Volume II as pages 96a-99a is the appendix to petitioner's reply brief in the court below. By the foregoing designations, the original pagination before the court below has been retained. The appendix to the petition for a writ of certiorari has been designated herein as the Appendix. These documents are hereinafter referred to as Vol. I, Vol. II and App., respectively.

was engaged in interstate commerce regulated by the Interstate Commerce Commission.

Petitioners, The Brotherhood of Locomotive Engineers *et al.*, are unincorporated associations and certain officials thereof whose duties, responsibilities and employment are in the State of Vermont. They set up and maintained grievance committees and other organizations among the employees of the Rutland in Vermont, organized a strike of railroad employees in Vermont and negotiated with the management of the Rutland in Vermont. Petitioners are hereinafter collectively referred to as the "Operating Brotherhoods".

The Rutland had, at all times material, collective bargaining agreements with each of the Operating Brotherhoods. They became effective at various times from March 18, 1949 to and including September 1, 1951 and were in effect at all times here in issue.

During 1959 the Rutland had been in financial difficulty. Its plight continued to worsen in 1960. During the first 8 months of 1960 it hauled 5,300 carloads of freight fewer than it hauled in the comparable period of 1959. At the same time, it suffered a decrease in railroad operating revenue of $264,000, compared with the same period in 1959. This downward trend became acute early in 1960 and the Rutland's Board of Directors met in the spring and summer of 1960 in order to devise methods for solving this problem. Management was directed to, and did, work out a program designed to provide substantially the same or improved service to shippers and consignees and, at the same time, reduce expenses by approximately $210,000 per year. This program, in essence, was one which resulted in re-arranged train schedules—eliminating certain overlapping freight train runs.

Prior to September of 1960, four train runs and two yard switchers were operated on the Ogdensburg Subdivision of the Rutland. The extreme limits of this Subdivision are Ogdensburg, New York, and Alburg, Vermont. Two trains had operated daily in opposite directions between Alburg and Norwood, New York, which are 95.7 miles apart. Two other trains operated out of Malone, New York, which is 36 miles east of Norwood, one going to Ogdensburg, New York, 60.8 miles, and returning each day, the other going to Alburg, Vermont, 59.7 miles and returning each day.

The proposed new train runs were, that in place of existing runs, there would be two new train runs, a daily local freight train each way between Alburg and Ogdensburg, 120.5 miles.[2] The net effect of this was a reduction in the number of crews by two involving only ten employees.

The Rutland, pursuant to the decision of its Board of Directors, posted bulletins on September 8, 1960, which "bulletined" the new train runs in compliance with existing agreements with the Operating Brotherhoods. (App. pp. 27-8) This permitted operating employees to bid on the jobs so to be made available on September 17, 1960.

On September 15, 1960, the Operating Brotherhoods sent a single telegram indicating to the Rutland that they would strike because "carrier cancelling 1957 and 1959 agreements by bulletins and changing home terminals and run through Vermont terminal for certain local freight crews." The Rutland replied by telegram, which stated in part as follows:

> " . . . Rutland Railway Corporation effective September 17, 1960 will arrange train assignments to

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[2] A map of the Rutland, which was before the Court of Appeals for the Second Circuit, is annexed hereto as an exhibit for the convenience of this Court.

> conform to the demands of traffic. The change is not and cannot be shown to have violated any rule or agreement as alleged. No agreement has been violated and the carrier is merely exercising its right to operate in an economical manner. Conferences on this issue have not been held on the property with the [Operating Brotherhoods] • • • " (Vol. I p. 72a-73a)

The Operating Brotherhoods struck on September 16, 1960.

On September 26, 1960, the Rutland filed a complaint in the United States District Court for the District of Vermont requesting that Court to enjoin the strike, to order the defendants to comply with the procedural requirements of the Railway Labor Act and to award damages.

On September 30, 1960, the Rutland submitted the dispute arising from the Operating Brotherhoods' claim that its action violated existing agreements with them to the National Railroad Adjustment Board. The Rutland's position was there stated as follows:

> "There are no restrictions under the existing agreements which prohibit carrier from establishing runs, abolishing runs, changing runs to operate out of different terminals to conform to the demands of traffic and operating in an economical manner when there is a falling off of business."

The Operating Brotherhoods have filed their answer with the National Railroad Adjustment Board, but no decision has yet been made. Accordingly, at all relevant times, the issue as to the Rutland's right to make the changes in train runs has been and still is before the National Railroad Adjustment Board which has exclusive jurisdiction to decide issues as to the meaning of the existing agreements between the parties under the Railway Labor Act.

On October 7, 1960 the Operating Brotherhoods moved, in the District Court, to dismiss the action on the ground of improper venue. This motion was denied on October 10, 1960, a decision which subsequently was unanimously affirmed by the court below. The Operating Brotherhoods then answered and filed a counterclaim seeking an injunction against the Rutland to prevent it from putting into effect its new train runs.

Hearings on the merits were held before the District Court at Windsor, Vermont, on the 19th and 20th days of October, 1960. At those hearings the testimony of 14 witnesses was heard and voluminous exhibits were presented to, analyzed by, and made a part of the record before the District Court. On October 26, 1960, the Court made its findings of fact and conclusions of law and entered its judgment order enjoining the strike.

In essence, the District Court found:

1. The Rutland had not previously negotiated changes in train runs with the Operating Brotherhoods.

2. All of the contentions of the Operating Brotherhoods turned upon the interpretation and application of the relevant provisions of the existing collective bargaining agreements.

3. Nothing in any of the agreements between the Rutland and the Operating Brotherhoods restricted the Rutland in any way as to the number of trains it must run nor were there any limitations in them which would prevent the Rutland from adding or abolishing train runs.

4. The District Court held, therefore, that the dispute was a *minor* dispute.

5. The Section 6 notices, hereinafter discussed, bore no relation to the actual controversy here involved.

The District Court granted the injunction against the Operating Brotherhoods stating that hearings on damages would be held at a later date. The Operating Brotherhoods' counterclaim was denied. (Vol. I, pp. 69a-78a, 83a-84a) Subsequently, on November 18, 1960, at the request of the Operating Brotherhoods, the District Court amended certain of its findings. The changes did not materially affect the original findings. (Compare Vol. I pp. 69a-77a with pp. 83a-84a)

The Operating Brotherhoods then appealed to the United States Court of Appeals for the Second Circuit.

As stated above, the court below unanimously upheld the decision of the District Court as to venue. A majority held that the dispute in issue was a *minor* dispute. It also found that, if the Rutland had made good faith efforts to confer with the Operating Brotherhoods about the dispute, then the District Court had properly found that the injunction against the strike should issue. The court below stated that the District Court had made no finding with respect to such efforts and, therefore, it reversed and remanded this action for further proceedings not inconsistent with its opinion.

If the District Court should find that the Rutland acted in good faith then it would have to hold a further hearing as to the damages suffered by it as a result of the strike by the Operating Brotherhoods.

The majority recognized the facts found by the District Court, holding, in effect, that the dispute at issue involved the right of the Rutland to change freight train runs under the existing agreements with the Operating Brotherhoods. The majority noted as well that certain Section 6 notices served by the Rutland on the Operating Brotherhoods, which are hereinafter described, and in which the Rutland proposed certain changes in the existing agreements with the Operating Brotherhoods, were restricted by their own

terms to proposals to change procedures for establishing new runs "... which the carrier does not now have the right to establish without agreement with its employees, ..." Finally, the majority observed that the Rutland's unilateral right under the existing agreements to change train runs was not affected by the Section 6 notices which, again, by their own terms, provide that, "all agreements * * * which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved."

Justice Marshall, after agreeing with the majority's treatment of the venue problem and with the fact that a labor dispute was involved in this case, dissented on the ground that the Rutland had voluntarily terminated so much of its existing collective bargaining agreements as might cover its right to establish the new train runs. In other words, he found that by serving the Section 6 notices referred to on the Operating Brotherhoods, the Rutland had terminated all provisions of existing collective bargaining agreements upon which the Rutland based its right to make the changes in train runs which are at issue here. He reached this conclusion in spite of the fact that under the provisions of the Railway Labor Act no carrier has power to change such agreements except by following the procedures thereof, which were only put in motion by the Section 6 notices, and the fact that no revised agreement has yet resulted therefrom. Based upon his conclusion that such agreements had been terminated, Justice Marshall held that the resulting dispute could no longer be *minor* because it could no longer involve the interpretation of existing agreements. He concluded that the dispute was a major dispute.

To understand the relationship between the dispute as to the Rutland's existing agreements which precipitated the strike and the dispute arising out of the Section 6

notices, one must determine, as have the courts below, whether or not the Rutland's then existing collective bargaining agreements contained any restriction on the Rutland's right to maintain or change the number of trains which it must run, the terminals thereof or the number of employees it must utilize in connection therewith. The District Court found as a fact that no such restrictions existed and the court below held that the existing collective bargaining agreements, reasonably interpreted, recognized implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960.

The Section 6 notices which had been sent on November 2, 1959 did not in any way change this situation. By their terms, the Section 6 notices[3] specified that they only

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[3] The relevant part of the text of the notices given by the Rutland to each of the Operating Brotherhoods was identical and read as follows:

"We hereby give notice, under our existing agreements and pursuant to the provisions of the Railway Labor Act, that effective January 1, 1960, we propose to revise and supplement such agreement or agreements in accordance with the proposal set forth in 'Attachment A' appended hereto.

ATTACHMENT A

* * * * *

"ROAD TRAIN AND ENGINE SERVICE ASSIGNMENTS.

"A. Except as hereinafter provided, eliminate all agreements, rules, regulations, interpretations, and practices, however established, applicable to any class or grade of road train or engine service employees, which

"(i) prohibit or impose restrictions on the right of the carrier to establish, move, consolidate or abolish crew terminals, or merge or consolidate seniority districts,

"(ii) prohibit or impose restrictions on the establishment or operation of interdivisional, inter-seniority district, intradivisional or intraseniority district runs,

"(iii) prohibit or provide penalties for running crews through established crew terminals, or

"(iv) provide for automatic release of crews upon arrival at terminals or end of run, or when off of assigned territory.

"B. Establish a rule to provide that

"1. The carrier shall have the right to establish, move, consolidate and abolish crew terminals, to merge and consolidate

applied to those situations where "the carrier does not now have the right to establish [changes in train runs] without agreement with its employees * * *". Their applicability was further restricted as shown in Section B-3 thereof which provided:

> "All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, *except that existing rules and practices considered by the carrier to be more favorable are preserved.*" Emphasis Supplied. f.n. 3, *supra.*

The majority opinion of the court below recognized the significance of the distinct and separate procedures utilized under the Railway Labor Act to handle major and *minor* disputes.

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seniority districts, and to establish interdivisional, interseniority district, intradivisional and intraseniority district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turnaround (including short turnaround) basis and through established crew terminals. * * *

"2. No rule, regulation, interpretation or practice, however established shall be construed to in any way prohibit, restrict or limit the provisions of paragraph 1 of this rule except as provided in sub-paragraphs (a) and (b) of this paragraph 2.

* * * * * *

"(b) *Before a run is established under the provisions of this rule which the carrier does not now have the right to establish without agreement with its employees* and which involves both the establishment of a new home terminal for the class of service involved and operation through an established crew terminal or terminals for such class of service, the carrier shall give notice to the general chairman * * *

"3. *All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the carrier to be more favorable are preserved.*" Emphasis Supplied. (App. pp. 6-7)

Major disputes involve *future* changes in *existing* agreements. They involve the *creation* of new contractual rights and are settled by non-compulsory procedures. First they are submitted to mediation, 45 U. S. C. §155 First; if that fails, to acceptance or rejection of arbitration, 45 U. S. C. §155 First; and, finally, to possible presidential intervention, 45 U. S. C. §160. Not until these procedures fail, can the parties resort to self-help (App. pp. 20-1).

Minor disputes involve the meaning and application of *existing* rights under *existing* agreements. As such, the Railway Labor Act provides for *compulsory arbitration* by the National Railroad Adjustment Board whose awards are final and binding, 45 U. S. C. §153, First (i), (m) and (p).

In summary, the Rutland, complying with its existing agreements with the Operating Brotherhoods, on September 8, 1960 posted bulletins announcing the new train runs. This was necessary because of the severe freight and income loss suffered by it in 1960. The Rutland had the unilateral right to make these changes. The strike arose solely as a result of the proposed new train runs. The Section 6 notices had no bearing on this. All of the contentions of the Operating Brotherhoods turn on the interpretations and application of the relevant provisions of existing collective bargaining agreements. This is a *minor* dispute under the Railway Labor Act. The existence of the Section 6 notices, having for their purpose *future* changes in *existing* agreements, did not, of themselves, change the *existing* agreements. Nor did they have any bearing upon the *minor* labor dispute which subsequently arose under those agreements. They did not preclude the submission of the *minor* dispute to the Adjustment Board or deprive that Board of its jurisdiction under the Railway Labor Act.

Summary of Argument.

Under Rule 19 of this Court, the question here presented is whether this Court in its sound discretion should grant the petition for a writ of certiorari and whether there exists in this case the "special and important reasons" which might lead this Court so to do. The Petition asserts incorrectly that a conflict exists with a decision of another Court of Appeals with regard to the venue of an unincorporated association. It is also asserted that the court below has decided an important question affecting labor relations in the railroad industry in a manner in conflict with appropriate decisions of this Court.

Respondent submits that the decisions by the courts below were correct under settled Federal law not only on the issue of venue but also as to those issues raised under the Railway Labor Act and the Norris-LaGuardia Act as those acts have been construed by prior decisions of this Court which offer clear and sufficient guidance for the decision reached below. There is no necessity for further consideration of the decision below by this Court.

Respondent further submits that to grant a petition for certiorari at this stage in the incomplete proceedings pending before the District Court could only lead to a multiplicity of appeals, confusion and delay in a final resolution of all of the issues here present after all findings of fact required to be made have been completed. Only then can it be determined whether or not any issues survive which might require resolution by this or any other court.

Argument.

I.

The petition for a writ of certiorari is premature and could result in a multiplicity of appeals, confusion and delay in the final resolution of the issues here present.

The decision below requires the District Court for the District of Vermont to hold hearings "to determine whether the railroad made reasonable efforts to settle this dispute in conference." This issue has not yet been tried.

If it is answered negatively, the Rutland will seek an appeal from such result.

Should the hearing result in a finding that the Rutland had made reasonable efforts to settle this dispute in conference, it must be assumed that the Operating Brotherhoods would either attempt to appeal that decision at that time or the District Court, in accordance with its decision below, would then be required to and would hold a further hearing "* * * on the issue of damages for this illegal strike * * *."

Only at the conclusion of this second hearing, on the assumption that the Rutland meets its burden at the first hearing, will all issues which have been presented to the courts below be resolved.

It is clear, therefore, that this petition for certiorari is premature. If granted, at least one and possibly two issues still remain open and subject to later determination by the District Court.

Any delay in the final determination as to the Rutland's reasonable efforts to settle this dispute in conference may result in prejudice to the Rutland because the subject of

the hearing will be events which occurred during 1960. Already two years have elapsed.

For all of these reasons, this is clearly not a proper time for review by this Court of the decision below. One and possibly two issues are outstanding and subject to further proceedings in the District Court. Logic and the orderly administration of justice require that no appeal be entertained until all issues here present have been finally disposed of by the District Court.

II.

The unanimous decision of the court below that an unincorporated association is subject to suit within the judicial district wherein it does business and carries on substantial activities within the venue statute, 28 U. S. C. §1391, was not in conflict with the decision of another court of appeals and represents the correct and proper interpretation of that statute.

The only Court of Appeals case cited by petitioners as evidencing a conflict with the decision of the court below on the venue question is *Brotherhood of Locomotive Firemen* v. *Graham*, 175 F. 2d 802 (D. C. Cir. 1948), reversed on other grounds, 338 U. S. 232 (1949).

The *Graham* case did not involve the venue statute in issue here. The briefs on appeal were written in terms of a different venue statute and that Court limited its holding to that statute. No actual conflict exists "on the same matter" [Rule 19(b) of the Rules of this Court] between the decision of the Court of Appeals in the *Graham* case and the decision below.

The *Graham* case did involve a consideration of the then existing venue statute as applied to unincorporated associations. 28 U. S. C. §112 (1947) provided that:

> ". . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

This venue statute was replaced, effective September 1, 1948. It became 28 U. S. C. §1391. In contrasting §112 and §1391(b) it should be noted, in passing, that, first, the old statute, which spoke in terms of a single defendant, was amended to include plural defendants. Second, the word "inhabitant" was deleted and the word "reside" was added together with the phrase "except as otherwise provided by law."

The applicable provisions of §112's replacement, §1391, which apply here read as follows:

> "§1391. Venue generally.
>
> . . .
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Although the provisions of §112 relied upon by the Court in the *Graham* case, *supra*, were substantially similar to §1391(b), that Court made it quite clear that, although it discussed Section 1391(b) it did not rely upon it. The Court stated at p. 804 note 2:

> ". . . [S]ince the decision of the trial court in the instant case was rendered and the briefs on appeal written in terms of the venue provision as

> phrased in Section 112, we refer in this opinion to that phrasing rather than to the phrasing of Section 1391(b)."

The Court in the *Graham* case heard argument on April 13, 1948. The new venue statute did not become effective until September 1, 1948. The decision of that Court of Appeals was not rendered until October 26, 1948. A detailed reading of its decision shows that the Court never considered Section 1391(c). This fact was commented upon subsequently in *Portsmouth Baseball Corporation* v. *Frick*, 132 F. Supp. 922 (S. D. N. Y. 1955), at p. 926:

> ". . . The Court of Appeals simply shut its eyes to subdivision (c) of Section 1391. . . . I cannot believe that the statement represents the court's mature and considered appraisal of the new legislation. It must have been the result of inadvertence. The purpose and effect of the new legislation [§1391] was to remove the existing limitation . . .".

Section 1391(c) is the key section for the purpose of determining whether a conflict exists. It is the section which prompted the court below to extend the concept of venue accorded corporations to that accorded unincorporated associations.

The court below, in applying the revised venue statute, 28 U. S. C., §1391, and especially subsection (c), properly followed the reasoning of Judge Learned Hand in *Sperry Products* v. *Association of American R. R.*, 132 F. 2d 408 (2d Cir. 1942), cert. denied, 319 U. S. 744 (1943), which involved the interpretation of the venue provision for patent infringement actions. This provision, 28 U. S. C., §109 (1940) stated that a suit for patent infringement might be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . .

shall have committed acts of infringement and have a regular and established place of business."

The court below followed Judge Hand's reasoning as to the only practical approach to the procedural problems involving unincorporated associations. It also relied upon the liberalization created by subsection (c), which specifies that a corporation could be sued wherever it was doing business. The court below assimilated the "residence" of unincorporated associations under 28 U. S. C., Section 1391(b) to that of corporations, 28 U. S. C., Section 1391(c). It held, therefore, that the "residence" of an unincorporated association for venue purposes under §1391(b) should be interpreted to include the judicial districts in which such an unincorporated jural entity was doing business.

For these reasons, if for no other, no true conflict exists between the decision in the *Graham* case and the decision of the court below.

The decision below was proper. See, for example, the rationale of the District Courts in *Portsmouth Baseball Corporation* v. *Frick, supra* and *American Airlines, Inc.* v. *Air Line Pilots Ass'n Inter.*, 169 F. Supp. 777 (S. D. N. Y. 1958), which represents the realistic, practical and enlightened point of view. These cases rely upon the reasoning of Judge Learned Hand in *Sperry Products, supra.* He stated, at p. 411:

> "It is not altogether clear a priori how to attribute location to a collective venture even after one has called it a jural person. In the case of a corporation, courts for long evaded the difficulty by saying that it was located in the state of its incorporation within whose borders it was confined. Bank of Augusta *v.* Earl, 13 Pet. 519, 10 L. Ed. 274. It finally became evident, however, that this resulted in too much injustice to be tolerable, and eventually there was evolved the concept that a corporation

> could be 'present' outside its state, that fact being determined by the extent of its local activities . . . . Obviously the same situation arises whenever we are to determine the location of an unincorporated association . . . As to such an association the test must always be what it is for a corporation outside the state of its incorporation. Indeed it is troublesome to see in what other way one can attribute location to such an association at all. It does not violate common understanding to think of a common venture or enterprise as having spatial position wherever any part of those activities take place by which it is realized. That is a practicable test and it is really the only practicable test. . . . There remains, so far as we can see, only what we have suggested; and we hold that the defendant Association was present wherever any substantial part of its activities were continuously carried on. Among those places was the Southern District of New York."

Judge Frank, concurring, stated at p. 412:

> ". . . I think we should, therefore, hold that the Association here is an inhabitant of, and can be sued in, the Southern District of New York, if that is *one* of its principal places of doing business."

The reasoning in the *Sperry* case appears to have been a most important factor in giving rise to the liberalized venue amendments of 1948 which were incorporated in 28 U. S. C. §1391. They were clearly designed to liberalize the restrictive venue requirements of the old statute relied on in the *Graham* case.

Contrary to the point of view stated in the Petition at p. 12, a basis exists for determining the intention of Congress with respect to liberalizing venue requirements relating to suits against labor organizations arising under

Federal law from at least 1947 on. In *American Airlines, Inc., supra*, this was shown at p. 782:

> "The soundness of the rule of the Portsmouth case, at least in so far as it applies to labor organizations, is indicated by Section 301 of the Labor Management Relations Act of 1947, enacted prior to Section 1391, which liberalized jurisdiction and venue requirements in suits against them. 29 U. S. C. A. §185."
>
> "Section 301 provides:
>
> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."
>
> "It may well be that Section 301 applies to labor organizations generally in suits arising out of federal law. This is indicated by the limited application of subdivisions (a) and (b) of Section 301 as contrasted with the apparently unlimited application of subdivision (c). Nor is this view at all inconsistent with the legislative history of this section.
>
> "But quite apart from this, Section 301 showed the mood of Congress with respect to suits against labor organizations arising under federal law at the time when Section 1391 was passed. * * *"

The decision below clearly represents the practical solution of a difficult problem. There is no necessity for this Court to comment thereon. It cannot be denied that the Operating Brotherhoods maintain grievance committees and other organizations among the employees of

the Rutland in Vermont, organized a strike of Rutland employees there and took other steps against the Rutland within the State of Vermont. If three of the four Operating Brotherhoods maintain a principal place of business in Cleveland, Ohio, and the fourth maintains a principal place of business in Cedar Rapids, Iowa, where should venue lie when all of the acts giving rise to the cause of action took place within the State of Vermont?[14]

In summary, no actual conflict exists between the decision in the *Graham* case and that of the court below. There is, therefore, no reason why this Court should consider the venue question in this case.

III.

This was a minor dispute as that term is used in the application of the Railway Labor Act.

This Court in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711 (1945), at pp. 723 to 724, set forth the distinction between major and *minor* disputes under the Railway Labor Act. The distinction there drawn, between those disputes which involve an attempt to acquire rights for the future by changing the terms of existing agreements (major disputes) and those disputes which involve the assertion of rights claimed to have accrued in the past (minor disputes), has been subsequently recognized and applied on numerous occasions by this Court and by lower courts as well-settled law.

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[14] At the trial, all 14 witnesses were residents of Vermont, northern New York and New Jersey. 4 of 5 individual defendants were residents of Vermont. The fifth was a New York resident. Even if it is assumed, *arguendo*, that petitioners' view is correct, this action would be subject to transfer to Vermont under 28 U. S. C. §1404(a).

This Court has recognized disputes arising under existing agreements as minor disputes in *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30 (1957), and in *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), rehearing denied, 364 U. S. 854.

Numerous lower courts have applied the principles of the *Elgin* case. *Baltimore & Ohio R. Co.* v. *United Railroad Wkrs.*, 271 F. 2d 87 (2d Cir. 1959), reversed and remanded on other grounds, 364 U. S. 278 (1960); *Norfolk & P. B. L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34 (4th Cir. 1957), cert. denied, 355 U. S. 914 (1958); *In re Hudson & Manhattan Railroad Company*, 172 F. Supp. 329 (S. D. N. Y. 1959), affirmed, 267 F. 2d 941 (2d Cir. 1959), cert. denied, 363 U. S. 843 (1960); *Louisville & Nashville Railroad Company* v. *Brown*, 252 F. 2d 149 (5th Cir. 1958), cert. denied, 356 U. S. 949 (1958).

Petitioners contend, Petition pp. 19-22, that the decision of the court below is in conflict with *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960). They rely on the statement that the dispute there at issue was major because it "relat[ed] to a major change, affecting jobs, in an existing collective bargaining agreement" at page 341. Both this language cited by petitioners, and an earlier statement by that court, indicate that the *Railroad Telegraphers* case, unlike this case, was a situation where the dispute arose over the attempt by one of the parties to *change* the terms of an existing agreement—which change clearly creates a major dispute: The court stated in *Railroad Telegraphers, supra*, at page 336:

> "'Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement.'"

Furthermore, as noted by the court below, if the *Railroad Telegraphers* court were adding the ingredient of the magnitude of the effect on working conditions as a condition relevant to whether a dispute was major or *minor, here only ten jobs were eliminated.* In *Railroad Telegraphers* an estimated several hundred jobs would have been eliminated. (See p. 343) See also *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co., supra,* decided after *Railroad Telegraphers* where this Court decided that a dispute affecting the jobs of five way-freight crews was a *minor* dispute on facts substantially similar to those presented to the court below.

When the Rutland "bulletined" its proposed train runs on September 8, 1960, it did so under the terms and conditions of its existing collective bargaining agreements with the Operating Brotherhoods. The finding by the District Court below that there had been no negotiations in the past between the Rutland and its employees over changes in train runs was not clearly erroneous. Further, across the nation, contrary to petitioners' assertion, at page 13 of their Petition, there is no national or uniform pattern as to whether management has the *unilateral* right to change train runs. Some railroads have more latitude to act unilaterally over changes in train runs than others.[5] Also, the Court below recognized that the finding by the trial judge that the existing agreements involved here, reasonably interpreted, implicitly recognized a right in the Rutland to make the changes which it had bulletined on September 8, 1960 was a proper finding consistent with existing law (App. pp. 29-31).

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[5] Presidential Railroad Commission Report (Feb. 28, 1962) at p. 295.

There can be no doubt that the decision by the courts below that the present dispute constituted a *minor* dispute was in accordance with settled Federal law enunciated in harmony with decisions of this Court and as applied in numerous decisions of other lower courts.

IV.

The dispute created by Respondent's Section 6 notices of November 2, 1959 has no relation to this case.

Inherent in the arguments made in the Petition herein, and especially at pages 12 through 27, is petitioners' assumption that the dispute involved here (as to the meaning of existing agreements which resulted in the September, 1960 strike) is the same dispute over the issues raised by the notices served on the Operating Brotherhoods under Section 6 of the Railway Labor Act. The Section 6 notices initiated procedures under the Act looking to *future* revision of *existing* agreements. These procedures as of this date have not been exhausted. This assumption and the arguments made therefrom are incorrect. The District Court found:

> "5. The facts that the carrier gave a Section 6 notice to its operating Brotherhoods on November 2, 1959, regarding a proposed new agreement to confirm its alleged unilateral authority under the existing agreements to abolish, establish, and move crew terminals, and that conferences on this proposed new agreement had not been terminated on September 8, 1960, *do not extinguish the underlying minor dispute or preclude submission of it to the Adjustment Board.* See *In the matter of Hudson & Manhattan Railroad Company*, 172 F. Supp. 329

> (S. D. N. Y. 1959), aff'd sub. nom. *Stichman* v. *General Grievance Committee of the Brotherhood of Railroad Trainmen*, 267 F. 2d 941 (2d Cir. 1959), cert. denied, 361 U. S. 928 (1960). *Nor should these facts be deemed to stay the underlying minor dispute until major dispute procedures are exhausted.*" Emphasis Supplied. (Vol. I, p. 76a).

The majority opinion of the Circuit Court below stated:

> ". . . the court below found that the railroad in making the September 1960 changes was not acting pursuant to the earlier [Section 6] notices. We cannot say that the district court was in error in so finding." (App., p. 26).

Petitioners' constant reference to the Section 6 notices, which admittedly created a major dispute under Section 6 of the Act, is designed to create the impression that the obligations of Section 6 were somehow transferred to the *minor* dispute which arose a year later out of a completely different situation. Nowhere do petitioners set out the full text of the applicable portions of the Section 6 notices which were served in 1959 and, which by their own terms, establish without more that the notices served by the Rutland had no relationship to the instant dispute. The full text of the notices served has been set forth *supra*, at p. 10, fn. 3.

The court below correctly analyzed the distinctions existing between this proceeding and *Butte Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (9th Cir. 1959), cert. denied, 361 U. S. 864 (1959) (App., pp. 26 and 27). There the carrier issued Section 6 notices in which it first proposed to allocate certain loading formerly done by yard crews to main line crews. No agreement as to this was reached. A second proposal to

reduce the size of yard crews was made and was also unacceptable. The carrier then announced that its shipper would do its own loading. The shipper owned all of the stock of the railroad. It was there held that the major dispute commenced by the carrier's Section 6 notices continued, for the action taken by the shipper should be imputed to its wholly-owned subsidiary, the railroad.

Here, however, as was properly found by the courts below, the Section 6 dispute was not related to this dispute at all (Vol. I, p. 76a; App. p. 26). There was no past practice in existence between the Rutland and the Operating Brotherhoods which would limit the Rutland's right to make the changes encompassed in its notices of September 8, 1960. In addition, and even more important, as was found by the courts below, there were no restrictions in the collective bargaining agreements between the Rutland and the Operating Brotherhoods which would limit the Rutland's unilateral right to make the changes which it had bulletined on September 8, 1960. The District Court so found, p. 7, *supra;* Vol. I, p. 74a. This finding was affirmed by the court below (App., pp. 29-30).

The Section 6 proceeding involved negotiations looking only to *future* changes in existing agreements. It did not, and could not, involve a dispute as to the meaning and application of provisions of existing agreements. It has no application, therefore, to the *minor* dispute underlying the strike here in issue. See *Hilbert* v. *Pennsylvania Railroad Company*, 290 F. 2d 881 (7th Cir. 1961), cert. denied, 368 U. S. 900 (1961), where that Court so held in an almost identical situation involving the same Section 6 notices here in issue. Clearly the management of the Rutland had the unilateral right to make the changes in train runs bulletined on September 8, 1960 without negotiating with the Operating Brotherhoods.

These findings by the District Court, affirmed by the Court below, are not in conflict with any of the provisions

of the Railway Labor Act. They are in in accord with those decisions which have interpreted its meaning as applied to the facts of the instant case.

V.

The court below correctly concluded that an injunction should issue to protect the jurisdiction of the National Railroad Adjustment Board, under the Railway Labor Act, to hear and determine a *minor* dispute which had been submitted to and accepted by it. Such an injunction accommodates the applicable provisions of the Norris-LaGuardia Act and conforms with prior decisions of this and other Courts.

The purposes and requirements of the Railway Labor Act and their subsequent interpretation by this and other court establishes the propriety of the decision of the court below.

The purposes of the Railway Labor Act, 45 U. S. C. §151 *et seq.* as set forth in §151a includes:

> "* * * (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

In *Elgin, J. & E. R. Co.* v. *Burley, supra,* this Court first considered the legislative history and the logical rationale behind the different treatments accorded disputes under the Railway Labor Act arising out of §151a(4)—major disputes and §151a(5)—*minor* disputes.

Contrary to the position taken in the Petition at page 14, the *Elgin* case and cases following have served to clarify and fulfill the purposes of the Railway Labor Act.

Major disputes involve *future* changes in *existing* agreements. They involve the *creation* of new contractual rights and are settled by non-complusory procedures. First they are submitted to mediation, 45 U. S. C. §155 First; if that fails, to acceptance or rejection of arbitration, 45 U. S. C. §155 First; and, finally, to possible presidential intervention, 45 U. S. C. §160. Not until these procedures fail, can the parties resort to self-help (App. pp. 20-1).

Minor disputes involve the meaning and application of *existing* rights under *existing* agreements. As such, the Railway Labor Act provides for *compulsory arbitration* by the National Railroad Adjustment Board whose awards are final and binding, 45 U. S. C. §153, First (i), (m) and (p).

Analysis of *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co., supra,* supports and reaffirms this conclusion. There this Court utilized its own prior and proper interpretation of the Railway Labor Act to determine whether an anti-strike injunction did properly issue to protect the exclusive jurisdiction of the National Railroad Adjustment Board over a *minor* dispute. The historically significant question resolved by this Court was whether or not such an injunction violated the provisions of the Norris-LaGuardia Act (29 U. S. C. §101 *et seq.*).

In *Chicago River, supra,* this Court finally established that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. It held at page 40:

> "• • • the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that

statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

On other occasions this Court, prior to *Chicago River*, had utilized injunctive relief to protect the statutory procedures of the Railway Labor Act: *Virginian Ry. v. Federation*, 300 U. S. 515 (1937); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952).

Since *Chicago River*, this Court and others have consistently followed that decision when, as here, the facts warranted it.[6] See for example *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., supra; Hilbert v. Pennsylvania Railroad Company, supra.* Contrary to the Petition at page 22, in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962) this Court at pp. 210-212 reaffirmed its earlier *Chicago River* decision and its application to Railway Labor Act situations such as this one.

An injunction is properly issued to enforce compliance with the requirements of the Railway Labor Act that a *minor* dispute is to be heard and determined by the National Railroad Adjustment Board only. No conflict with the Norris-LaGuardia Act exists. This result reached by the court below does not conflict with *Chicago River*, or other decisions of this Court.

In summary, the factual situation presented by this case cannot be applied generally in the railroad industry. There is no national pattern as to whether or not a carrier's management under its existing agreements has the unilateral right to make changes in operations of the type in issue here. Contrary to the dissenting opinion in the court below, the dispute as to future terms and conditions of employment to be incorporated in new agreements which was created by

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[6] The facts found by the District Court in this case are discussed herein at page 7.

the Section 6 notices has no relation whatsoever to the *minor* dispute which resulted in the illegal strike of September 16, 1960. There had been no negotiations in the past nor were there any restrictions in existing collective-bargaining agreements which limited management's unilateral right to make the changes in issue here. The Court below correctly concluded that venue was proper and an injunction could issue under the circumstances here present. These and all holdings of the court below were correct under settled Federal law. They were in harmony with the terms of the Railway Labor Act and the Norris-LaGuardia Act and the decisions of this Court which have construed them.

In any event, the petition is premature. At least one if not two hearings are required before a final determination of all issues can be made.

Conclusion.

For the foregoing reasons, respondent respectfully submits that this case is not a proper one for review by certiorari in this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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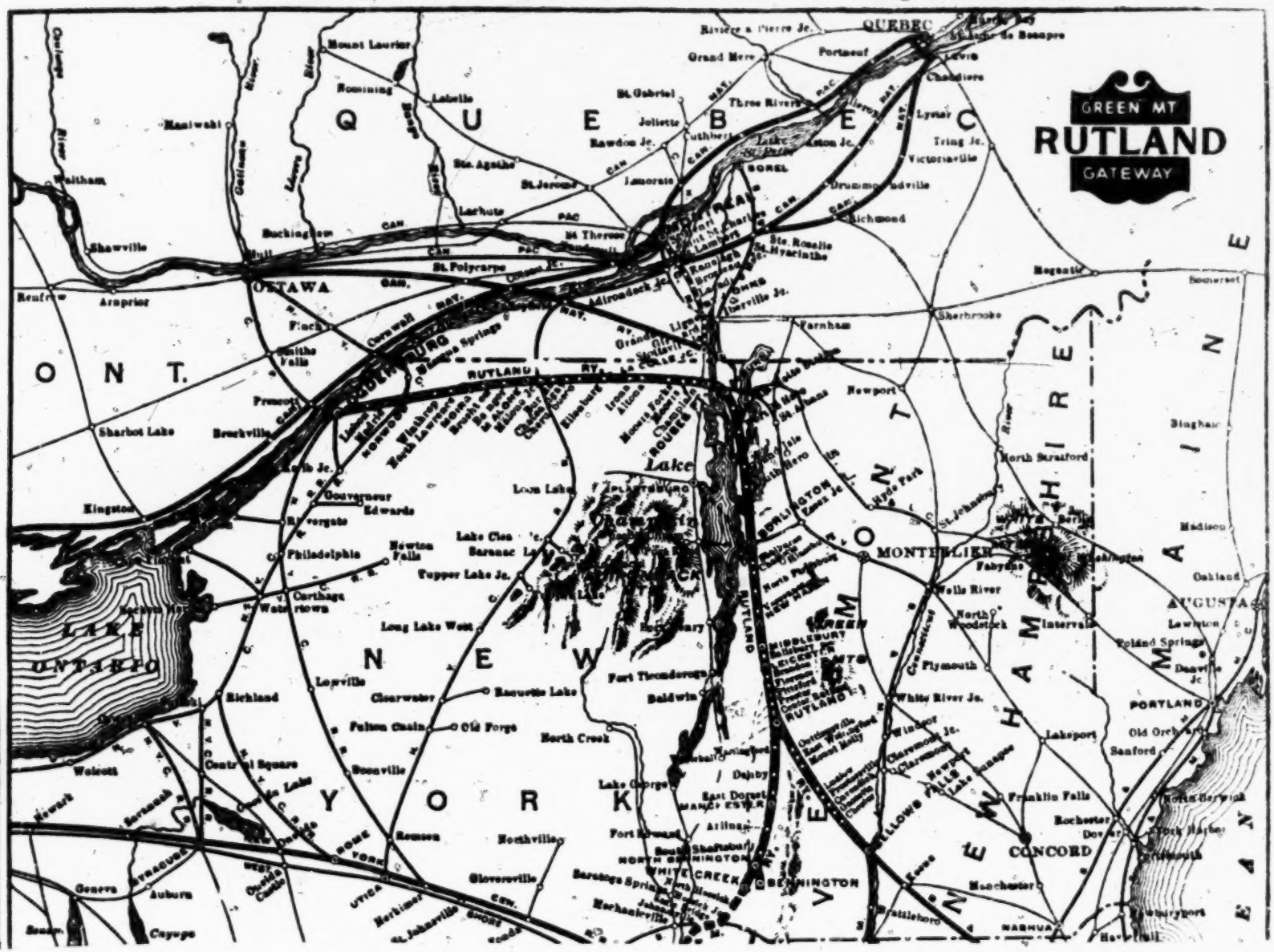
Of Counsel:

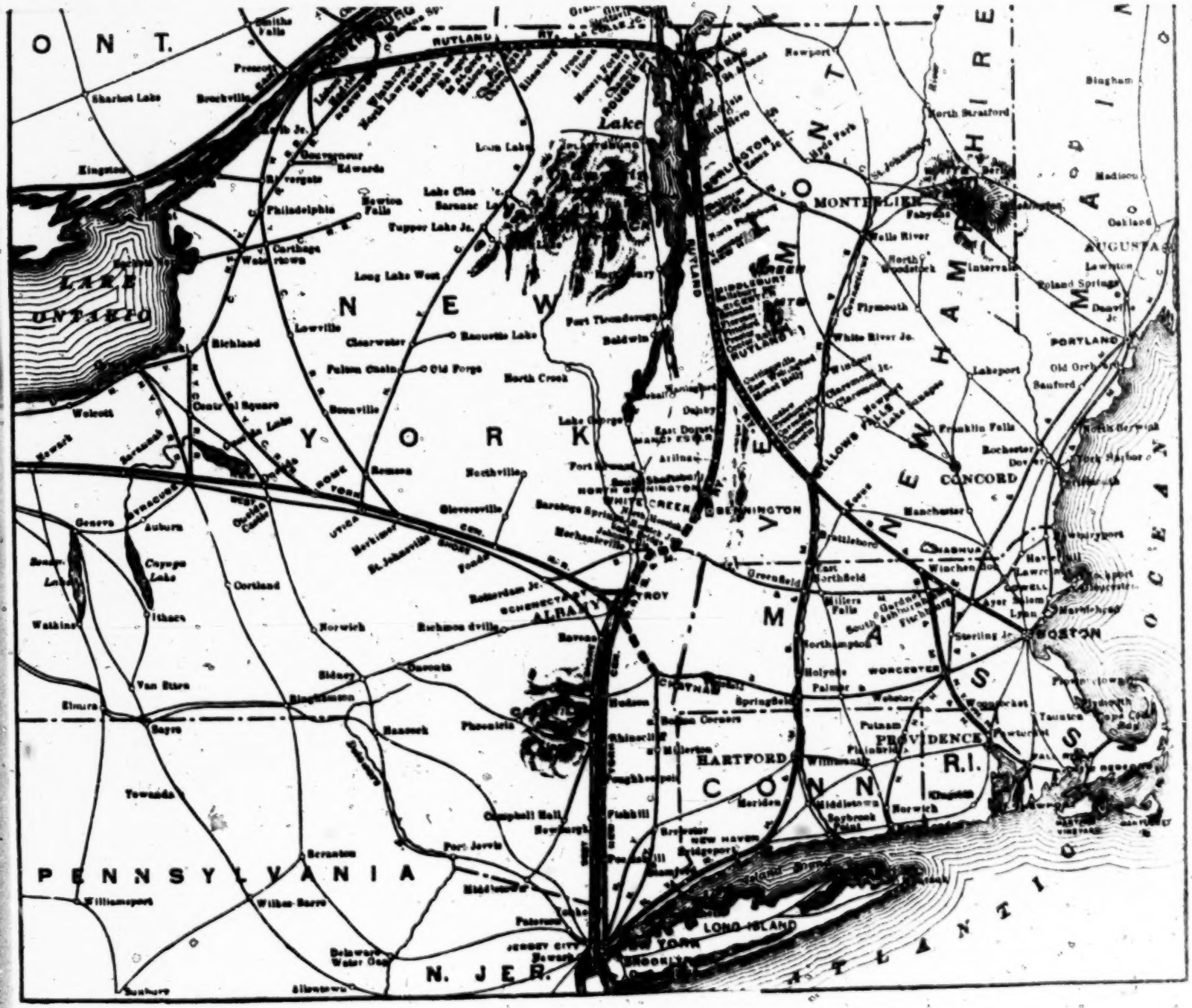
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Rutland Railway Corporation,
Pine Street,
Rutland, Vermont.

CHARLES D PEET,
HARRY F. MARTIN, JR.,
New York, N. Y.

October 4, 1962.

"GREEN MOUNTAIN—LAKE CHAMPLAIN ROUTE"




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VERMONT
NEW HAMPSHIRE
MASS.
CONN.
R.I.
ATLANTIC OCEAN
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